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Fighting Piracy in Somalia (and Elsewhere): Why More Is Needed

Milena Sterio*

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Milena Sterio

Abstract

This Article argues that pirates should be treated as terrorists and that piracy-fighting countries should rely on a variety of antiterrorist conventions to justify the capture and prosecution of pirates. To provide a comprehensive outlook on piracy, Part I of this Article describes the history of piracy and its reappearance in the modern world. Part II briefly describes the resurgence of modern-day piracy, first in Southeast Asia and then in Somalia. Part III provides the current international legal framework for battling piracy, by focusing first on the definition of piracy in international law, and then on the existing international legal authority to apprehend and prosecute pirates. Part IV describes the existing options and solutions for fighting pirates, including domestic prosecutions, prosecutions in ad hoc tribunals, regional partnerships, and the aid of international maritime organizations. Part V advocates the need to fight piracy more aggressively, explaining the similarity between pirates and terrorists. Finally, Part V also advocates the need to rebuild Somalia and its institutions, as this is the only permanent solution to eradicate piracy in this region of the world.

FIGHTING PIRACY IN SOMALIA (AND ELSEWHERE): WHY MORE IS NEEDED

*Milena Sterio**

INTRODUCTION

The Somali pirates are dangerous. They are sea terrorists, operating on a supranational level—beyond the reach of any laws, in the name of no particular state, and against no specific nations.¹ They enjoy complete impunity; most of the time, they are simply chased off, and if captured, they are often released.² It would be unimaginable for the United States to capture an Al-Qaeda operative or a member of any other terrorist group in order to then promptly release him or her, not wanting to bother with the cost and difficulty of a criminal prosecution. Yet, this is precisely what some countries, like United Kingdom and France, have done with respect to captured pirates—they have let them go.³ Other nations and maritime powers have, wrongly, not said a word about it. The global *laissez-faire* attitude toward the Somali pirates needs to change, and the passivity of the United States and other naval nations toward these sea terrorists must come to an end.

World powers, like the United States, should be willing to take on the Somali pirates for several reasons. First, the legal tools needed to capture and prosecute these pirates are already in place. The United Nations Security Council has facilitated the fight against Somali piracy by passing five different resolutions during 2008.⁴ These resolutions authorize nations patrolling

* Assistant Professor of Law, Cleveland-Marshall College of Law, J.D., Cornell Law School, *magna cum laude*, 2002; Maitrise en Droit (French law degree), Université Paris I-Panthéon-Sorbonne, *cum laude*, 2002; D.E.A. (master's degree), Private International Law, Université Paris I-Panthéon-Sorbonne, *cum laude*, 2003; B.A., Rutgers University, French Literature and Political Science, *summa cum laude*, 1998. The author thanks Ekaterina Zabalueva for her invaluable assistance with the research and writing of this article.

1. See discussion *infra* Part V.A.
2. See discussion *infra* Part IV.A.
3. See discussion *infra* Part IV.A.
4. See *infra* Part III.B.

waters in the Indian Ocean, off the Somali coast, to cross into the twelve nautical mile zone of Somali territorial waters if self-defending or pursuing pirates.⁵ Moreover, a combination of two different international conventions regulating the law of the seas arguably provides jurisdiction to try pirates to either the capturing nation or to any nation where the pirates have been rendered for prosecution.⁶ The United Kingdom, for instance, has even signed a memorandum of understanding with its regional partner Kenya whereby Kenya would try any pirates captured by the United Kingdom.⁷ Thus, world powers like the United Kingdom and the United States may apprehend and try Somali pirates under existing law. It is time that they actually do so.

Second, pirates are sea terrorists and may be or become linked to other terrorist groups.⁸ For now, we do not know whether the proceeds of piracy are financing other forms of terrorism. However, it is reasonably likely that the Somali pirates will be befriended by groups like the Taliban or Al-Qaeda, for whom pirates can easily steal money and weapons. Furthermore, the Somali pirates, if linked to a terrorist group, may attempt to use the hostages that they are already holding⁹ as political leverage against a host of unreasonable and politically dangerous demands. This type of hostage use is not novel. Some may remember the hijacking of the Italian cruise ship *Achille Lauro* in 1985 by a faction of the Palestinian Liberation Organization. The hijackers refused to release the kidnapped hostages unless Israel released a group of Palestinian prisoners.¹⁰ The United States has been lucky until recently—only one U.S. ship was successfully hijacked by the Somali pirates and, after a three day long stand-

5. See *infra* Part III.B.

6. See discussion *infra* Part III.A.

7. See Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, ASIL INSIGHT (Am. Soc'y of Int'l Law, Wash., D.C.), Feb. 6, 2009, <http://www.asil.org/insights090206.cfm>.

8. U.S. officials believe that there are Al-Qaeda operatives in Somalia. See Todd Pitman, *Ending Somali Piracy: Few Options for US Forces*, GUARDIAN (London), Apr. 14, 2009, <http://www.guardian.co.uk/world/feedarticle/8455767>.

9. By the end of 2009, suspected Somali pirates held 12 vessels for ransom with 263 crewmembers of various nationalities as hostages. See Louis Charbonneau, *EU Welcomes China's Support Against Somalia Piracy*, INSURANCE J., Jan. 29, 2010, <http://www.insurancejournal.com/news/international/2010/01/29/106976.htm>.

10. See *infra* Part III.A.

off in the Indian Ocean, all U.S. hostages were safely rescued.¹¹ In the future, the United States may not remain as fortunate. The Somali pirates have already pledged that they would go after more U.S. ships and, in the recent months, have certainly done so, albeit with no success.¹² Thus, the threat of piracy linked to traditional forms of terrorism looms large for countries, like the United States, that may become particular targets.

Finally, not fighting Somali piracy signals a careless passivity to potentially dangerous individuals and groups across the globe looking to engage in similar types of criminal behavior. If the United States, the United Kingdom, or France is not willing to fight pirates in Somalia, then the Nigerian or Indonesian pirates may become just as brash in their efforts to seize ships, steal money, and capture hostages. Then, piracy would become a global issue, as it once was in the sixteenth and seventeenth centuries.¹³ This is a dangerous proposal that should be cut at its roots.

This Article argues that pirates should be treated as terrorists and that piracy-fighting countries should rely on a variety of antiterrorist conventions to justify the capture and prosecution of pirates. Piracy resembles terrorism in many aspects, on both a theoretical and practical level, and reliance on antiterrorist conventions by piracy-fighting countries will provide these countries with greater legal tools to battle pirates within an established international legal framework. To provide a comprehensive outlook on piracy, Part I of this Article describes the history of piracy and its reappearance in the modern world. Part II briefly describes the resurgence of modern-day piracy, first in Southeast Asia and then in Somalia. Part III provides the

11. See, e.g., Elizabeth A. Kennedy & Katharine Houreld, *Norfolk-Based Ship Arrives in Kenya; Negotiations for Captain Break Down*, VIRGINIAN-PILOT (Norfolk), Apr. 12, 2009, at A1; Robin Shulman, *Somali Charged with Piracy in Attack on U.S. Ship*, WASH. POST, Apr. 22, 2009, at A2; *Pirates Attack U.S. Cargo Ship But Fail to Get Aboard*, CNN, Apr. 14, 2009, <http://www.cnn.com/2009/WORLD/africa/04/14/somalia.pirates/>.

12. Somali pirates vowed to go after more U.S. ships after several pirates were killed during the successful rescue by the United States of a U.S. captain held hostage. See Elizabeth A. Kennedy, *Pirates Target, Vow to Kill US Crews*, BOSTON GLOBE, Apr. 16, 2009, at A14. Several days later, they attempted to hijack a U.S. ship, the *Liberty Sun*, but were unsuccessful. See Robert Wright, *Pirates Damage US Aid Ship*, FINANCIAL TIMES (London), Apr. 16, 2009, at 2; see also *New Pirate Attack Thwarted in Gulf of Aden*, CNN, Apr. 19, 2009, <http://www.cnn.com/2009/WORLD/africa/04/19/pirate.attack.foiled/>.

13. See discussion *infra* Part I.

current international legal framework for battling piracy, by focusing first on the definition of piracy in international law, and then on the existing international legal authority to apprehend and prosecute pirates. Part IV describes the existing options and solutions for fighting pirates, including domestic prosecutions, prosecutions in ad hoc tribunals, regional partnerships, and the aid of international maritime organizations. Part V advocates the need to fight piracy more aggressively, explaining the similarity between pirates and terrorists, and argues that pirates should be apprehended and prosecuted like terrorists. Finally, Part V also advocates for the need to rebuild Somalia and its institutions, as this is the only permanent solution to eradicate piracy in this region of the world. Before concluding, this Article briefly addresses a potential criticism: that the fight against piracy may be entirely illusory because maritime powers may not have any true incentive to combat pirates, for a variety of financial, geopolitical, or strategic reasons. This Article recognizes such criticism, but advances the argument that pirates (at least theoretically or normatively) need to be fought with full force. Thus, this Article concludes that serious efforts by piracy-fighting countries will be needed to resolve the piracy issue, and that, above all, piracy-fighting countries may need to focus on rebuilding war-torn regions to prevent lawlessness, including piracy, from thriving in other parts of the world.

I. PIRACY: A HISTORICAL PERSPECTIVE

Piracy has always existed. First descriptions of the practice exist in Homer's *The Iliad*¹⁴ and *The Odyssey*,¹⁵ and piracy was considered a reputable profession in Greek mythology.¹⁶ In the first century B.C., piracy was viewed as a legitimate practice in the Mediterranean because pirates supplied the Roman empire with

14. See HOMER, *THE ILIAD* 189–90 (Prentiss Cummings trans., Little, Brown, and Co. 1912) (750–725 B.C.) (recounting Achilles' plunder of twelve cities during naval campaigns).

15. See HOMER, *THE ODYSSEY* 126 (Louise Ropes Loomis ed., Samuel Butler trans., Walter J. Black, Inc. 1944) (800 B.C.) (analogizing to the practices of pirates).

16. See, e.g., VIVIAN LOUIS FORBES, *CONFLICT AND COOPERATION IN MANAGING MARITIME SPACE IN SEMI-ENCLOSED SEA* 102 (2001); George P. Smith, II, *From Cutlass to Cat-O'-Nine Tails: The Case for International Jurisdiction of Mutiny on the High Seas*, 10 MICH. J. INT'L L. 277, 291 n.140 (1989).

slaves for its luxury markets.¹⁷ It was not until pirates began disrupting vital trade routes to the East and to Africa that cities began to form alliances against pirates.¹⁸ The Roman empire embraced the fights against piracy, and in 67 B.C., a Roman commander, Pompey, was finally ordered to rid the Mediterranean of pirates.¹⁹ Because of the Roman fight against piracy, the definition of piracy can be traced back to the Roman republic: Cicero dubbed pirates “*hostis humani generi*,”²⁰ and contemporaneous laws drafted by Cicero and the Roman Senate construed piracy as both action against individuals and against the nation as a whole.²¹ Under Roman law, all crimes constituting piracy had to occur outside the municipal jurisdiction of any nation; the pirate was viewed as an enemy of the entire human race and could be prosecuted under municipal law after capture, but the right to prosecute was common to all nations.²² These early laws still form the foundation of international criminal law on piracy, and introduce the notion of universal jurisdiction over piracy.²³ In fact, piracy is the first and foremost universal jurisdiction crime.²⁴

While piracy was viewed as a universal crime during the Roman era, the view on pirates changed later in time, and piracy reached its so-called golden age during the sixteenth and seventeenth centuries.²⁵ In the sixteenth century, the English Queen Elizabeth actually viewed pirates as adjuncts to the Crown’s navy in its fight against Spanish trade.²⁶ Piracy thus became a form of state-sponsored terrorism, and pirates themselves were considered “an ideal way to strike one’s enemy and hide the blade.”²⁷ During the Elizabethan era, piracy was like

17. See Jon D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 *NAVAL L. REV.* 73, 87 (2008).

18. See *id.*

19. See *id.*

20. The phrase “*hostis humani generi*” translates from Latin as “enemies of the human race.” See, e.g., Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 *U. MIAMI INT’L & COMP. L. REV.* 293, 298 (2006).

21. See ALFRED P. RUBIN, *THE LAW OF PIRACY* 2, 18, 61 (2d ed. 1998).

22. See BARRY DUBNER, *THE LAW OF INTERNATIONAL SEA PIRACY* 42 (1980).

23. See RUBIN, *supra* note 21, at 117–18.

24. Kontorovich, *supra* note 7.

25. See Burgess, *supra* note 20, at 302–06 (describing the golden age of piracy).

26. See M.J. PETERSON, *An Historical Perspective on the Incidence of Piracy*, in *PIRACY AT SEA* 41, 52 (Eric Ellen ed., 1989).

27. Burgess, *supra* note 20, at 302–03.

modern-day terrorism: it contemplated the use of terror and force for a particular political end.²⁸

With the end of the Spanish wars in the seventeenth century, the laws against pirates briefly returned.²⁹ King James I undertook efforts to fight piracy, but his efforts yielded poor results as many pirates returned to their trade and as impoverished men turned to the practice of piracy.³⁰ In fact, historians believe that men turned to piracy not only for monetary gain, but also because of “feelings of inferiority, rebelliousness against their low station in life, anarchical hatred, jealousy, [and] revenge. . . . Cast out from the fold, these men regarded piracy as a means of exacting personal vengeance on civilization itself.”³¹ Most pirates came from the lowest spheres of society, and seemed to be motivated by both monetary and political aims.³² Pirates during the golden age saw themselves as rebels against the established societal order, “meting out ferocious revenge on a society that had wronged them from birth.”³³

Some pirate captains acted like modern-day terrorists: they had a reputation for barbarism and ferocity, adopted a satanic appearance, and ruled as despots through terror.³⁴ Pirates in this era, however, did not operate in a state of anarchy; rather, they adopted codes of conduct known as “pirate articles,” to organize and structure pirate ships like a naval unit.³⁵ Thus, pirates were

28. See RUBIN, *supra* note 21, at 59.

29. See David J. Starkey, *Pirates and Markets*, in BANDITS AT SEA: A PIRATES READER 107, 111 (C.R. Pennell ed., 2001).

30. See Burgess, *supra* note 20, at 303.

31. *Id.* at 304.

32. *See id.* at 306.

33. *Id.*

34. *See id.* at 304.

35. *See id.* at 305–06. An excerpt from the self-governing pirate articles of Captain John Phillips in 1723 provides:

1. Every man shall obey civil Command; the Captain shall have one full Share and a half in all prizes; the Master, Carpenter, Boatswain, and Gunner shall have one Share and a quarter.

2. If any Man shall offer to run away, or keep any Secret from the Company, he shall be maroon[e]d with one Bottle of Powder, one Bottle of Water, one small Arm, and Shot.

...

4. If at any Time we shall meet another Marooner (that is, Pyrate) that Man shall sign his Articles without the Consent of our Company, shall suffer such Punishment as the Captain and Company shall think fit.

similar to terrorists in that they had their own organizational rules and punishments for disobedience, which all existed on a supranational level. In essence, "the pirate ship becomes a quasi-state unto itself, a legal anomaly which customary international law recognized by granting universal jurisdiction on its capture."³⁶

Toward the late seventeenth century, with the end of many wars between the powerful naval nations (England, France, and Spain, among others), piracy suddenly stopped being used a state-sponsored weapon and pirates, instead of acting on behalf of certain states, turned against them.³⁷ In response to this shift in piracy activities, laws of the naval nations changed and began to target pirates. In 1696, Sir Charles Hedges in England defined piracy as "sea-robbery,"³⁸ and in 1700, England passed the Piracy Act,³⁹ replacing jury trials of pirates with special commissions applying both civil and admiralty law.⁴⁰ Thus, a fundamental shift occurred in the law from the laissez-faire attitude toward piracy of the Elizabethan era, to a view of piracy as a crime of universal jurisdiction in the early eighteenth century, just like in the Roman era.⁴¹ In 1721, England passed an even more stringent Piracy Act,⁴² bringing an end to the piracy golden age.⁴³

In the eighteenth and nineteenth centuries, piracy did not disappear.

...

9. If at any time you meet with a prudent Woman, that Man that offers to meddle with her, without her Consent, shall suffer present Death.

DANIEL DEFOE, *A GENERAL HISTORY OF THE PYRATES* 342-43 (Manuel Schonhorn ed., J.M. Dent & Sons 1999) (1724).

36. Burgess, *supra* note 20, at 306.

37. *See id.* at 307 (citing *PIRATES AND PRIVATEERS: NEW PERSPECTIVES ON THE WAR ON TRADE IN THE EIGHTEENTH AND NINETEENTH CENTURIES* 119 (David J. Starkey et al. eds., 1997)); *see also* Starkey, *supra* note 29, at 118.

38. *See* Burgess, *supra* note 20, at 310 (quoting C.M. SENIOR, *A NATION OF PIRATES: ENGLISH PIRACY IN ITS HEYDAY* 38 (1976)).

39. *See* Act for the More Effectual Suppression of Piracy, 1700, 11 & 12 Will. 3, c.7, *reprinted in* SIR WILLIAM DAVID EVANS, *6 A COLLECTION OF STATUTES CONNECTED WITH THE GENERAL ADMINISTRATION OF THE LAW; ARRANGED ACCORDING TO THE ORDER OF SUBJECTS: WITH NOTES* 126 (3d ed. 1836); *see also* RUBIN, *supra* note 21, at 400.

40. *See* Burgess, *supra* note 20, at 311 (citing P. Bradley Nutting, *The Madagascar Connection: Parliament and Piracy, 1690-1701*, 22 AM. J. LEGAL HIST. 202, 209 (1978)).

41. *See id.* at 312.

42. *See* An Act for the More Effectual Suppressing of Piracy, 1721, 8 Geo. 1, c. 24, *reprinted in* EVANS, *supra* note 39, at 131.

43. *See* Burgess, *supra* note 20, at 312; *see also* Starkey, *supra* note 29, at 121.

The pirates of the eighteenth and nineteenth centuries were no longer the flotsam of Europe's mercantile labor force, but tightly-woven bands of Eastern corsairs, succeeding generations of piratical clans sharing familial, tribal, ethnic, religious, or political identities. Their continued survival was assured by the Great Powers themselves, as Britain and France actively encouraged the corsairs to disrupt the other's trade.⁴⁴

Although piracy was state-sponsored as it was in the Elizabethan era, piracy in the eighteenth and nineteenth centuries developed a different characteristic. Piracy became an act of savagery: if committed by English or French nationals belonging to civilized nations, it was viewed as treason, but if committed by "savages," it was both permissible and politically useful.⁴⁵ "By terming piracy an act of barbarity, the law was thus able to meld the competing doctrines of political utility and *hostis humani generi*."⁴⁶ This view of piracy led to a paradoxical situation, because the more the great powers employed pirates against each other, the more their laws drove the definition of piracy toward *hostis humani generi*.⁴⁷ Finally, great powers arrived at the modern-day definition of piracy as a crime so heinous toward humanity in general, that pirates can be defined as enemies of humanity on the whole.⁴⁸

For example, the emerging U.S. Navy scored a victory against the Barbary pirates in 1804, signaling that pirates would be viewed as an international threat.⁴⁹ In 1856, the Declaration of Paris,⁵⁰ signed by almost all imperial powers, abolished all forms of piracy, and pirates became subject to capture and trial where they were apprehended.⁵¹ Thus, states themselves recognized in

44. Burgess, *supra* note 20, at 313 (citing PETER EARLE, *CORSAIRS OF MALTA AND BARBARY* 23, 42, 265-66 (1970)).

45. *See id.*; *see also* RUBIN, *supra* note 21, at 93-94.

46. Burgess, *supra* note 20, at 313.

47. *See id.* (citing EARLE, *supra* note 44, at 267).

48. *See id.* at 313-15.

49. *See id.* at 314 (citing Philip Buhler, *New Struggle with an Old Menace: Toward a Revised Definition of Maritime Piracy*, 8 CURRENTS: INT'L TRADE L.J. 61, 64 (1999)).

50. *See* Declaration of Paris Respecting Maritime Law, Apr. 16, 1856, 115 Consol. T.S. 1, *reprinted in* 1 AM.J. INT'L L. 89 (Supp. 1907).

51. *See* Burgess, *supra* note 20, at 314 (citing Anne Pérotin-Dumon, *The Pirate and the Emperor: Power and the Law on the Seas, 1450-1850*, in BANDITS AT SEA: A PIRATE READER, *supra* note 29, at 45; P. W. Birnie, *Piracy Past, Present and Future*, in PIRACY AT SEA, *supra* note 26, at 132).

1856 their own shared guilt in supporting and enabling piracy during the previous centuries.⁵² The situation is somewhat analogous to the modern-day combat against terrorism: many states today have been blamed for training and supporting terrorist groups for their own political aims,⁵³ and many such states have now vowed to fight terrorism.⁵⁴ The Declaration of Paris and subsequent legislation created a separate legal entity for pirates, viewed neither as individuals nor states.⁵⁵ Rather, piracy was defined as a political tool beyond the scope of legitimate state behavior, and pirates themselves were not entitled to any form of citizenship protection. A pirate became defined as “a malevolent satellite to the law of nations, waging war upon them not only through his acts, but through his identity.”⁵⁶ Toward the end of the nineteenth century, the abolition of piracy was solidified when even more nations, including the United States, repudiated it as parties to the Hague Conventions of 1899 and 1907.⁵⁷

Several points thus emerge from the historical perspective of piracy described above, linking piracy to modern-day terrorism (and justifying this Article’s argument, below, that pirates today should be fought just like terrorists). First, piracy, like terrorism, embraces the use of terror by nonstate actors as a means of coercing of states and their citizens.⁵⁸ Second, piracy has historically been much more than sea robbery. Piracy should be understood as a political tool for governments, private individuals, or groups whose actions are directed toward a

52. *See id.* at 314–15 (citing Pérotin-Dumon, *supra* note 51, at 45).

53. *See* Burgess, *supra* note 20, at 314.

54. *See id.*

55. *See id.* at 315.

56. *Id.*

57. Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864, July 29, 1899, 32 Stat. 1827, 1 Bevans 263; Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Oct. 18, 1907, 36 Stat. 2371, 1 Bevans 694. The Hague Conventions do not explicitly mention pirates, but they permit the capturing state to charge individuals, if they are not acting pursuant to state orders or schemes, under their domestic criminal law. Thus, states can charge individuals with piracy if the crime of piracy can be found in municipal law. *See* RUBIN, *supra* note 21, at 199, nn.255, 294; *see also* Peppetti, *supra* note 17, at 88 n.86.

58. *See* Burgess, *supra* note 20, at 315; *see also* Marcus Rediker, *The Seaman as Pirate: Plunder and Social Banditry at Sea*, in *BANDITS AT SEA: A PIRATE READER*, *supra* note 29, at 155.

particular political goal of the sponsoring state. Acts of piracy, viewed in this light, closely resemble terrorist acts.⁵⁹ Third, pirate motivation throughout history closely resembles contemporary terrorist motivation. Pirates waged a war against the world, which they viewed as unjust, and terrorists today similarly aim their acts against particular nations, in a war of nonstate actors versus states.⁶⁰ Finally, the legal definitions of piracy and terrorism have evolved to resemble each other.⁶¹ Piracy today is seen less as sea robbery and more as maritime terrorism,⁶² as discussed below and as reflected in modern-day treaties.⁶³ “As the world has moved beyond the Cold War into a new century and new political realities, so too will piracy law adopt these realities within a new, unabashedly political, definition.”⁶⁴

II. MODERN-DAY PIRACY

As described above, piracy was a hugely significant issue throughout the Middle Ages. In the twentieth century, however, the practice virtually disappeared before resurfacing again in the late twentieth century, first in Southeast Asia and later in Somalia.

A. Southeast Asia

In the mid-1990s, piracy reemerged as a potent maritime problem, affecting all nations, and thriving in specific waters and sea passages.⁶⁵ In fact, driven by financial gains, modern-day pirates seem to target particular straits where many ships pass because of geography, such as the Suez Canal, the Panama Canal, and the Strait of Malacca.⁶⁶

Throughout the 1990s and the early 2000s, the Strait of Malacca in Southeast Asia saw an increase in pirate attacks, most likely because thirty percent of the world’s annual commerce and fifty percent of the world’s oil pass through this narrow body of

59. See Burgess, *supra* note 20, at 315–16.

60. See *id.* at 316.

61. See *id.*

62. See *id.* at 318 & n.129.

63. See *infra* Part III.

64. See Burgess, *supra* note 20, at 321.

65. See, e.g., Peppetti, *supra* note 17, at 88.

66. See *id.*

water.⁶⁷ For example, in 1996, armed pirates hijacked the Malaysian oil tanker *Suci* in Indonesian waters, capturing the ship's crew and later repainted the ship and changed its name.⁶⁸ The crew members were ultimately released by the pirates, but the *Suci* has never been found.⁶⁹ In 1999, a Japanese tanker, *Alondra Rainbow*, was attacked while sailing out of an Indonesian port.⁷⁰ The crew was dumped onto a lifeboat and the pirates retained the ship and its cargo.⁷¹ The International Maritime Bureau ("IMB"), a branch of the International Chamber of Commerce specializing in maritime affairs, reported 335 pirate attacks in 2001, 370 in 2002, 445 in 2003, and 325 in 2004.⁷² While these numbers represent attacks throughout the world, many of them occurred off the coast of Southeast Asia.⁷³ In fact, Indonesian waters were considered the world's most dangerous in 2006, with fifty pirate attacks.⁷⁴

Throughout the last decade, however, the Southeast Asian nations, in particular Indonesia, Malaysia, and Singapore, undertook significant effort to combat and reduce piracy off their shores.⁷⁵ Their efforts yielded solid results, as piracy seems to have drastically subsided in that area. Piracy, however, surged in the most recent years off the coast of Somalia.

B. Somalia

Somalia is poor and war-torn. It has not had a stable government since 1991.⁷⁶ It is thus fertile ground for various

67. *See id.* at 82.

68. *See* Helen Gibson, *A Plague of Pirates: Modern Buccaneers with Machine Guns Instead of Cutlasses Are Once Again the Scourge of the Oceans*, TIME, Aug. 18, 1997, at 28.

69. *See* Andre Bolt, *US Warships Seek Pirate-Hit Tanker*, COURIER MAIL (Queensl.), Apr. 28, 1998, at 3; Philippe B. Moulrier & Ethan Casey, *Pirates? What Pirates?*, U.S. NEWS & WORLD REP., June 23, 1997, at 33.

70. *See* Peppetti, *supra* note 17, at 108.

71. *See id.* The *Alondra Rainbow* and the pirates that had hijacked the ship were ultimately captured by the Indian navy. *See id.* at 109.

72. *See* Niclas Dahlvang, *Thieves, Robbers, & Terrorists: Piracy in the 21st Century*, 4 REGENT J. INT'L L. 17, 17-18 (2006).

73. *See id.* at 18.

74. *See* Peppetti, *supra* note 17, at 83.

75. J. Ashley Roach, *Piracy Off Somalia: the Challenges for International Law*, Panel Discussion at the 103d Annual Meeting of the American Society of International Law (Mar. 26, 2009) [hereinafter ASIL Meeting].

76. Kontorovich, *supra* note 7.

forms of criminal activity, such as piracy.⁷⁷ Starting in 2007, pirate attacks intensified off the coast of Somalia, particularly in the Gulf of Aden, a strait between northern Somalia—the Horn of Africa—and the Arabian Peninsula.⁷⁸ In 2008 alone, piracy attacks increased by two hundred percent,⁷⁹ and the first few months of 2009 saw dozens of piracy attacks not only in the Gulf of Aden, but also farther out in the Indian Ocean.⁸⁰ Because naval forces from piracy-fighting countries, including the United States, heavily patrol the Gulf of Aden, the pirates moved their operations farther south to the Indian Ocean.⁸¹ The Somali pirates are currently holding close to three hundred hostages or crewmembers from over a dozen ships.⁸²

The modus operandi seems simple: the Somali pirates sail out of Somali ports, equipped with potent weapons and fast ships, attack ships by firing at them, and then board them to overtake their crew members.⁸³ Recently, pirates have also begun to capture larger vessels, which they use as “mother ships” to launch their tiny skiffs throughout hundreds of miles in the Indian Ocean.⁸⁴ Most cargo ship crews are not equipped with defensive weapons and not trained to fight pirates.⁸⁵ In fact, shipping companies themselves instruct their personnel not to risk lives by engaging in fights with pirates.⁸⁶ After ships are seized, the Somali pirates retreat back to Somali ports and coastal towns, where they enjoy complete impunity.⁸⁷ Somalia does not have a stable central government that can adequately apprehend

77. See, e.g., Jane G. Dalton et al., *Introductory Note to United Nations Security Council: Piracy and Armed Robbery at Sea—Resolutions 1816, 1846 & 1851*, 48 I.L.M. 129, 129 (2009) (“Fueled by the violent political and economic instability in Somalia, the lack of a viable infrastructure to counter lawlessness, and the continued proliferation of ever-more-sophisticated small arms and light weapons . . . piracy and armed robbery have increasingly endangered legitimate shipping in the waters off the coast of Somalia.”).

78. Kontorovich, *supra* note 7.

79. See *id.*

80. Int'l Mar. Bureau [IMB], Int'l Chamber of Commerce [ICC], *Piracy and Armed Robbery Against Ships: Report for the Period 1 January–31 March 2009*, at 29 (Apr. 2009).

81. See Katharine Houreld, *U.S.-Flagged Cargo Ship Has Run-in With Somali Pirates*, PITTSBURGH POST-GAZETTE, Apr. 9, 2009, at A1.

82. See Pitman, *supra* note 8.

83. See *id.*

84. See *id.*

85. See ASIL Meeting, *supra* note 75.

86. *Id.*

87. *Id.* (noting that hijacked ships are moored along the Somali coast).

pirates.⁸⁸ In fact, entire coastal towns in Somalia live off the proceeds of piracy.⁸⁹ Pirates seem to drive the local economy and thus enjoy societal protection everywhere within their country. Poverty is rampant in Somalia,⁹⁰ and statistics show that a single seizure of a ship can earn each pirate up to US\$150,000.⁹¹ Thus, pirates are driven by the financial promise of large sums of quick money with low risk of ever being caught. Shipping companies routinely pay millions of dollars in ransom to the Somali pirates.⁹² The pirates, in turn, have respected their promise not to harm hostages if ransom is paid and have in most instances released all hostages in good health.⁹³

Thus, the surge of piracy in Somalia seems to be driven by poverty and fueled by the lack of a government and criminal law enforcement mechanism. Moreover, until now, the lack of a strong international response to fight Somali piracy has also contributed to the proliferation of piracy acts in the Gulf of Aden and the Indian Ocean. The tides may be turning on piracy, and we may witness a more unified and potent battle to eradicate Somali piracy, through a joint effort of naval powers.⁹⁴ However,

88. See Pitman, *supra* note 8 (recounting that Somalia “disintegrated in 1991 when warlords toppled the president” and that since then, “it’s been ruled by heavily armed rival clans, hit by famine, and suffered relentless outbreaks of street-fighting that turned it into a no-go zone for most foreigners”).

89. See Mohamed Ahmed, *Pirate Stock Exchange Helps Fund Hijackings*, FINANCIAL POST (Can.), Dec. 1, 2009, <http://www.financialpost.com/news-sectors/story.html?id=2289558>; Pitman, *supra* note 8 (noting that pirates operate openly in several towns along the coast).

90. See *Seychelles Coast Guard Arrests 9 Suspected Pirates*, ORLANDO SENTINEL, Apr. 28, 2009, at A2 (observing that the average person earns around US\$600 per year in Somalia).

91. See Kontorovich, *supra* note 7.

92. See Katharine Houreld, *Somali Pirates Avoid Warships To Hijack 3 Ships*, HUFFINGTON POST, Apr. 6, 2009, <http://www.huffingtonpost.com/huff-wires/20090406/piracy/> (describing the “multi-million dollar ransoms” that shipping companies pay, which contribute to a “rare source of cash in Somalia.”).

93. See Pitman, *supra* note 8 (indicating that pirates have rarely harmed hostages).

94. In the recent months, more nations have expressed their willingness to apprehend pirates. On April 15, 2009, the French navy captured eleven pirates after they launched an attack on the pirate ship that the French navy spotted with a surveillance helicopter and observed over night. See *Somali Pirates: We Will Hunt Americans, 'Slaughter Them'*, CHICAGO TRIB., Apr. 15, 2009, at A10. Similarly, Yemen’s coast guard rescued thirteen Yemeni hostages in a shootout with the pirates on April 13, 2009. *Id.* The German navy captured seven pirates on April 15, 2009, after pursuing the pirates by warships in the Gulf of Aden. See *Pirates Captured After Attacking German Tanker*, CNN, Apr. 15, 2009, <http://www.cnn.com/2009/WORLD/africa/03/31/german.pirates.arrests.somalia/>. Last, but not least, the United States navy successfully

the fight against piracy on the whole will not be complete without a full reexamination, and possible elaboration, of international law, to define and sharpen the legal tools needed to capture and prosecute both pirates themselves and the masterminds of piracy operations. Without such reliance on international law, piracy may surge in other areas of the world, where poverty and unstable governments persist. Thus, Part III outlines the current definition of piracy under international law, and the existing jurisdictional basis to capture and prosecute pirates.

III. *PIRACY AND INTERNATIONAL LAW*

International law currently defines piracy in several conventions and provides for specific basis under which countries may capture and prosecute pirates.

A. *Definition of Piracy Under International Law*

The first successful modern-day attempt to codify the law of piracy occurred in 1958, when eight articles addressing piracy directly were adopted in Geneva and included in the Convention on the High Seas (“Geneva Convention”).⁹⁵ These articles were subsequently included in the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”).⁹⁶ UNCLOS, while not ratified by all countries, including the United States, nonetheless represents “the best evidence of international law relating to the maritime regime, and is therefore binding on all nations.”⁹⁷

Under UNCLOS, an act must satisfy four criteria in order to constitute piracy: it must (1) be committed on the high seas, (2) be of a violent nature, (3) include at least two vessels, and (4) be

liberated a U.S. skipper, Richard Phillips, who surrendered himself to Somali pirates after they attempted to hijack Phillips’ ship, *Maersk Alabama*, and were warded off by the ship’s crew. See Robert D. McFadden & Scott Shane, *Navy Rescues Captain, Killing 3 Pirate Captors*, NEW YORK TIMES, Apr. 13, 2009, at A1. Finally, many nations have recently pledged US\$213 million to boost security in Somalia and halt piracy. See *More Than \$200M Pledged To Beat Somali Pirates*, CNN, Apr. 24, 2009, <http://www.cnn.com/2009/WORLD/africa/04/24/pirates.security.meeting.money/>.

95. See Convention on the High Seas arts. 14–21, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter Geneva Convention].

96. See United Nations Convention on the Law of the Sea arts. 100–07, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

97. See Peppetti, *supra* note 17, at 90–91.

committed for solely private aims.⁹⁸ This definition is widely accepted as a reflection of customary law and recognized as the most authoritative codification of piracy law, but significantly narrows the definition of piracy.⁹⁹ First, any act, in order to qualify as piracy, must be committed on the high seas.¹⁰⁰ This means that acts committed in the territorial waters of any state would not qualify as piracy,¹⁰¹ even though they include the violent seizure of a victim vessel by an aggressor vessel, for solely private aims, such as monetary gain or hostage taking. Many of the acts referred to as “piracy” routinely committed in the early 2000s in Southeast Asia in the territorial waters of Singapore, Malaysia, and Indonesia, were *stricto sensu* not piracy under the UNCLOS definition.¹⁰² Similarly, acts committed by the Somali pirates in the Somali territorial waters would not constitute piracy, simply because they take place in the wrong geographic zone.

Second, any act that fulfills the legal requirements of piracy must involve separate vessels: a victim vessel and an aggressor vessel.¹⁰³ If pirates board the victim vessel on shore and overtake it during the victim vessel’s voyage on the high seas, such an act would not qualify as piracy because no aggressor vessel was involved.¹⁰⁴ Thus if the Somali pirates were to board a foreign ship docked in port by posing as crewmembers and then overtake the ship on the high seas, this would not be piracy under UNCLOS. For instance, when members of a Palestine Liberation Organization (“PLO”) faction overtook the Italian cruise ship

98. Article 101 of the United Nations Convention on the Law of the Sea (“UNCLOS”) defines piracy as

(a) any illegal acts of violence, 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.

UNCLOS, *supra* note 96, art. 101. Article 15 of the Convention on the High Seas includes the same definition of piracy. *See* Geneva Convention, *supra* note 95, art. 15.

99. *See* Peppetti, *supra* note 17, at 92.

100. *See id.* at 92–93.

101. *See id.*

102. ASIL Meeting, *supra* note 75.

103. *See* Dahlvang, *supra* note 72, at 27.

104. *See id.*

Achille Lauro in 1985, the act did not constitute piracy under UNCLOS because the aggressors had boarded the ship in its last port; thus, no aggressor vessel.¹⁰⁵

Third, if a piracy-like act is committed by a group with links to a specific state, the state action character of the act would defeat the wholly private aims requirement of UNCLOS because of the alleged link between piracy and state action.¹⁰⁶ Thus, in the *Achille Lauro* incident, it was questionable whether the hijacking qualified as piracy because the hijackers had specific links to a state or a state-like entity, the PLO.¹⁰⁷

The international maritime community recognized the need to expand the definition of piracy and drafted the Suppression of Unlawful Acts Against the Safety of Maritime Navigation Convention (“SUA Convention”).¹⁰⁸ The SUA Convention drafters attempted to come up with a broader definition of illegal violence at sea, which would capture acts such as the *Achille Lauro* hijacking.¹⁰⁹ Under the SUA Convention, an act can qualify as “piracy” even though it is not committed on the high seas.¹¹⁰ Similarly, an act can qualify as “piracy” even though only one vessel (the victim vessel) may be involved.¹¹¹ The SUA Convention, however, does not use the term “piracy” at all,¹¹² and is even listed on the United Nations (“U.N.”) website as an antiterrorist convention.¹¹³ Thus, it is questionable whether the SUA Convention actually alters the definition of piracy.

105. For a description of the *Achille Lauro* incident, see *id.* at 27–28.

106. See Peppetti, *supra* note 17, at 92 (arguing that the “private ends” restriction has contributed to the most commonly adopted view that acts of violence committed for religious, ethnic, or political reasons, such as acts of maritime terrorism, cannot be treated as piracy).

107. See Dahlvang, *supra* note 72, at 26–27.

108. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 3, Mar. 10, 1988, S. TREATY DOC. NO. 101-1 (1990), 1678 U.N.T.S. 221 [hereinafter SUA Convention].

109. See Dahlvang, *supra* note 72, at 22.

110. SUA Convention, *supra* note 108, art. 4; see also Peppetti, *supra* note 17, at 94.

111. See SUA Convention, *supra* note 108, art. 3 (prohibiting any person from “seiz[ing] or exercis[ing] control over a ship by force or threat thereof or any other form of intimidation”).

112. See Dahlvang, *supra* note 72, at 23 (noting that the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA”) does not refer to piracy by name).

113. See UN Action to Counter Terrorism: International Instruments to Counter Terrorism, <http://www.un.org/terrorism/instruments.shtml> (last visited Feb. 28, 2010).

The SUA Convention, however, does solidify the link between piracy and terrorism, by treating piracy as a form of maritime terrorism and by equating the jurisdictional basis for the capture and prosecution of pirates with those that already exist in other antiterrorist conventions for the capture and prosecution of terrorists. In fact, in response to recent acts of terrorism, the maritime industry attempted to strengthen SUA through amendments, known as the 2005 Protocols, which were adopted on October 14, 2005, but have not yet entered into force for lack of necessary state ratifications.¹¹⁴ Thus, this Article argues below that piracy-fighting countries need to rely more heavily on conventions like SUA and other antiterrorism treaties, in order to justify their capture and prosecution of pirates, because pirates should be fought like terrorists.

B. *Jurisdiction to Capture Pirates*

Under international treaty law and under customary law, any state has jurisdiction on the high seas to capture pirates.¹¹⁵ Article 19 of the Geneva Convention and article 105 of UNCLOS provide: “On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.”¹¹⁶ In fact, under the law of the seas, the high seas are viewed as no man’s land and jurisdiction to apprehend belongs to all nations.¹¹⁷ However, no nation has the right to enter a state’s territorial waters, within which only the state has exclusive jurisdiction to apprehend.¹¹⁸

114. See IMO: Summary of Status of Conventions, http://www.imo.org/conventions/mainframe.asp?topic_id=247 (last visited Feb. 28, 2010); see also Jane Andrewartha, *English Maritime Law Update: 2005*, 37 MAR. L. & COM. 359, 369 (2006).

115. See Dahlvang, *supra* note 72, at 22 (noting that every state may seize a pirate ship and arrest the pirates on the high seas).

116. UNCLOS, *supra* note 96, art. 105; Geneva Convention, *supra* note 95, art. 19.

117. Hugo Grotius developed the concept of “*mare liberum*” in the early seventeenth century and established the doctrine of freedom of the seas. Peppetti, *supra* note 17, at 106.

118. UNCLOS limits the territorial waters of a state to twelve nautical miles off shore. UNCLOS, *supra* note 96, art. 3. Note however that some nations, including China, have taken a nonconformist approach and claim that their exclusive economic zones, which typically extend out to two hundred nautical miles, constitute territorial waters. See Dahlvang, *supra* note 72, at 24. This approach significantly hinders the piracy fight

The Somali pirates quickly took advantage of this situation in 2007 when they would attack ships in the Gulf of Aden and then quickly return to the Somali territorial waters, where they were immune from capture by nations patrolling the Gulf of Aden in an attempt to combat piracy.¹¹⁹ In order to address this unfortunate situation, the United Nations Security Council passed five different resolutions in 2008, authorizing any nation patrolling the Gulf of Aden to enter the Somali territorial waters and to use force against pirates.¹²⁰ One of the five resolutions even authorizes nations to enter the Somali territorial waters if in “hot pursuit” of pirates.¹²¹ Another, from December 16, 2008, extends the authorization to use military force against Somali pirates to land-based operations on the Somali mainland.¹²² Under this resolution, nations can “undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea.”¹²³

Because the above resolutions permit military action in Somali territory beyond that already authorized by customary law, many states with a history of piracy problems were apprehensive about the scope of such resolutions and feared that they would undermine national territorial sovereignty.¹²⁴ Thus, the text accompanying the resolutions emphasized that they applied solely to Somalia and that they would not establish any new precedent under international law.¹²⁵ Moreover, all of the

under customary law, although the 2008 U.N. Security Council resolutions, *see infra* note 120, arguably trump customary law and allow any nation to fight piracy in Somali territorial waters, whether such waters extend to twelve or two hundred nautical miles.

119. *See* Kontorovich, *supra* note 7.

120. *See* S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008); S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008); S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).

121. *See* S.C. Res. 1816, *supra* note 120, ¶ 7(a).

122. S.C. Res. 1851, *supra* note 120, ¶ 6.

123. *Id.* The United States, the main proponent and drafter of Resolution 1851, initially proposed language that would authorize operations in the Somali air space when combating piracy, but this draft language was withdrawn when other nations objected. The United States, however, maintains that Resolution 1851, as is, authorizes operations in Somali air space. *US Says Piracy Resolution Allows for Air Strikes in Somalia*, AGENCE FRANCE PRESSE, Dec. 17, 2008, available at 12/17/08 Agence Fr.-Presse 22:07:00 (Westlaw).

124. *See* Kontorovich, *supra* note 7.

125. *See, e.g.*, S.C. Res. 1816, *supra* note 120, ¶ 9 (affirming that the resolution “applies only with respect to the situation in Somalia and shall not affect the rights or

resolutions require consent from the Somali transitional government before any of the patrolling nations attempts to enter the Somali territorial waters.¹²⁶ Similarly, three of the five resolutions require the patrolling nations to respect international humanitarian law when chasing pirates and entering the Somali territorial waters.¹²⁷ The latter restriction is problematic: under international humanitarian law, pirates are considered civilians, which significantly limits the nature and type of force that can be used against them.¹²⁸

Under the SUA Convention, states have jurisdiction to apprehend and capture pirates anywhere, not just on the high seas.¹²⁹ Thus, the SUA Convention gives states more freedom in their fight against piracy, like antiterrorist conventions do for any state's fight against terrorism. However, under the SUA, a vessel must nonetheless be in international transit, coming from a foreign territory or the high seas, at the time of the illegal act.¹³⁰ Thus, a vessel navigating through purely territorial waters of a state could not be apprehended under the SUA, and nations do not have a right of entry into another nation's territorial waters to capture pirates under this convention.¹³¹

As described in this section, international treaty and customary law provides for narrow basis under which pirates can be apprehended on the high seas or elsewhere. Recent U.N. Security Council Resolutions have further expanded such basis for the capture of Somali pirates, but unfortunately these resolutions only apply to Somalia and will not be useful in fighting piracy anywhere else in the world. Moreover, as will be described in Part III.C, jurisdiction to capture pirates under

obligations or responsibilities of member states under international law . . . with respect to any other situation").

126. See, e.g., S.C. Res. 1851, *supra* note 120, ¶ 3 (qualifying the ability to pursue pirates into Somali waters with the "advance consent of the [Somali government]").

127. See S.C. Res. 1851, *supra* note 120, ¶ 6; S.C. Res. 1846, *supra* note 120, ¶ 14; S.C. Res. 1816, *supra* note 4, ¶ 11. Moreover, Resolution 1838 only authorizes patrolling nations to use "the necessary means, in conformity with international law." S.C. Res. 1838, *supra* note 120, ¶ 3.

128. See Kontorovich, *supra* note 7 (reasoning that pirates may only be specifically targeted in immediate self-defense because they are treated like civilians under international humanitarian law).

129. See SUA Convention, *supra* note 108, art. 4.

130. See *id.*

131. See Peppetti, *supra* note 17, at 97.

international law does not necessarily correspond to jurisdiction to prosecute them, which may pose additional hurdles in the global fight against piracy, and which may support this Article's argument that piracy-fighting nations need to treat pirates as terrorists and rely on antiterrorist laws.

C. *Jurisdiction to Prosecute Pirates*

Piracy is the original universal jurisdiction crime.¹³² Thus, under traditional customary law, piracy is viewed as a heinous crime against all nations and any state, acting as a global agent on behalf of all nations, can choose to prosecute the offending pirate.¹³³ Treaty law and domestic laws, however, curtail the customary law conception of piracy.¹³⁴

Article 19 of the Geneva Convention states that: “[t]he 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.”¹³⁵ Article 105 of UNCLOS repeats this principle, by specifically authorizing the capturing nation to prosecute pirates.¹³⁶ Other states, however, are not entitled to prosecute pirates under the Geneva Convention or under UNCLOS.¹³⁷ This is problematic for states, such as the United Kingdom, that transfer captured pirates to so-called regional partner states, like Kenya, for prosecution.¹³⁸ Under UNCLOS, the legality of this type of transfer is dubious because only the capturing state holds jurisdiction over captured pirates, and receiving states, like Kenya, do not.¹³⁹

Under the SUA Convention, states again have more freedom in terms of their jurisdiction to prosecute pirates. Under this treaty, member states have an obligation to extradite or

132. See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. J. INT'L L. 183, 184 (2004).

133. See Peppetti, *supra* note 17, at 106.

134. See *id.* at 107 (indicating domestic prosecution is often times not authorized under the prosecuting state's national legal system).

135. Geneva Convention, *supra* note 95, art. 19.

136. UNCLOS, *supra* note 96, art. 105.

137. See Kontorovich, *supra* note 7.

138. See *infra* Part IV.C.

139. See Kontorovich, *supra* note 7.

prosecute persons accused of behavior that qualifies as piracy.¹⁴⁰ While the SUA authorizes the capturing state to prosecute pirates, it also condones transfers of pirates to third states, even indicating that the third state “shall” accept such transferred pirates.¹⁴¹ The SUA Convention conceptualizes piracy similarly to how antiterrorist conventions construe acts of terrorism, by allowing virtually any state to prosecute captured pirates.¹⁴² Thus, states like the United Kingdom may rely on the SUA to justify the transfer of captured pirates to regional partners like Kenya.¹⁴³

Despite states’ international legal obligations stemming from UNCLOS and the SUA Convention, domestic statutes do not always allow for universal jurisdiction. The U.S. statute implementing the SUA Convention, for instance, limits the U.S. jurisdictional ability to prosecute pirates.¹⁴⁴ Under this statute, the United States has jurisdiction to prosecute pirates only if such pirates somehow acted against U.S. interests.¹⁴⁵ Thus, the United States may only prosecute pirates in the United States if captured on the high seas and the pirates directed their activities against U.S. ships or victims, or if the pirates are somehow later found on U.S. soil.¹⁴⁶

Piracy-fighting states should continue to justify the legality of their antipiracy measures, such as the prosecution of captured pirates, by emphasizing the similarity between piracy and terrorism and by relying on other antiterrorist conventions. This Article outlines below the current possible responses to the

140. See SUA Convention, *supra* note 108, art. 10 (“[T]he state Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that state.”). Note, however, that scholars have argued that the obligation to prosecute “only imposes the requirement to hold a preliminary hearing, and not to actually prosecute the alleged offender before an independent court of criminal justice.” Peppetti, *supra* note 17, at 96.

141. See SUA Convention, *supra* note 108, art. 6(4).

142. See *id.* art. 6.

143. Reliance on the SUA Convention is problematic, however, since most nations where pirate attacks typically occur, including Indonesia, Malaysia, and Somalia, are not members of this convention. See Dahlvang, *supra* note 72, at 23; Kontorovich, *supra* note 7.

144. See 18 U.S.C. § 2280 (2006).

145. See *id.* § 2280(b) (limiting jurisdiction to a variety of situations involving the United States).

146. See *id.*

piracy threat, including the different prosecution options that either already exist or have been advocated as solutions to this emerging crime.

IV. POSSIBLE RESPONSES TO THE CURRENT PIRACY THREAT

Several responses exist or have been suggested to fight piracy. Specifically, these responses include different prosecution options that exist over apprehended pirates, thereby avoiding the situation where pirates are merely warded off or even released if caught, as well as the existing international maritime organizations that, through various efforts, aid the combat against piracy.

A. *Domestic Prosecution*

The most likely response to the piracy threat involves prosecution of captured pirates in the domestic courts of the capturing state.¹⁴⁷ Interestingly, this option has not been exercised much in the most recent examples of captured Somali pirates.¹⁴⁸ For example, when North Atlantic Treaty Organization (“NATO”) forces rescued several fishermen from Somali pirates in the Gulf of Aden in April 2009, they released the pirates because they had no authority to arrest them.¹⁴⁹ When a Dutch ship operating as part of a NATO fleet captured several pirates in April 2009, the Dutch government announced quickly thereafter that it would release the pirates because their seizure was incorrect under Dutch law, as none of the pirates, victims, or the victim vessel was Dutch.¹⁵⁰ Until this year, the United Kingdom and the United States opted to transfer captured pirates to a regional partner, such as Kenya, for prosecution rather than prosecute them domestically.¹⁵¹

147. One example of domestic prosecution of pirates is the *Alondra Rainbow* incident described above in Part I. In that case, captured pirates were prosecuted in India, the capturing nation, and received prison sentences of up to seven years. *See, e.g.*, Peppet, *supra* note 17, at 108–10 (describing the *Alondra Rainbow* incident and subsequent pirate prosecution in India).

148. Todd Pitman & Katharine Houreld, *NATO Frees 20 Hostages; Pirates Seize Belgian Ship*, BOSTON GLOBE, Apr. 19, 2009, at A3 (noting that pirate prosecutions are rare).

149. *See id.*

150. *See id.*

151. *See id.*

The reasons why nations capturing pirates have been reluctant to prosecute vary. First, many domestic laws only allow for domestic criminal prosecution of pirates if they somehow threatened the national interests of the prosecuting state.¹⁵² Thus, the United States was unable to prosecute any Somali pirates under its domestic law until April of 2009, when a U.S. ship was attacked and its U.S. captain was held hostage.¹⁵³ Once U.S. interests were threatened, the United States became an available forum for the prosecution of Somali pirates.¹⁵⁴ Similarly the French only chose to prosecute Somali pirates in France for acts of piracy directed against a French luxury yacht.¹⁵⁵ French law, similarly to U.S. law, allows for prosecution of pirates under circumstances in which French national interests were attacked.¹⁵⁶

Second, nations that capture pirates may opt against prosecution because of the cost. In fact, paying ransom to pirates for the release of the captive ship and crew may be a less expensive option than attempting to capture pirates and to bring them to the capturing nation for prosecution.¹⁵⁷ For example, the United States recently captured a Somali pirate who was involved in the attack on a U.S. ship in the Indian Ocean; the pirate was brought to New York for prosecution under U.S. law.¹⁵⁸ The pirate's prosecution and eventual detention, if he is convicted, will cost the United States millions of dollars—an amount much higher than a single ransom payment demanded by the Somali pirates.¹⁵⁹ While prosecuting pirates in domestic courts of the capturing state may be sensible for the purpose of

152. See *supra* Part III.C (using U.S. law as an example).

153. See *supra* notes 11, 94 and accompanying text (describing the April 2009 hijacking of the U.S. ship *Maersk Alabama*).

154. See Pitman & Houreld, *supra* note 148 (noting that the only captured hijacker of U.S. captain Richard Phillips was brought to New York for trial in the U.S. District Court for the Southern District of New York).

155. See *France Raid Ship After Crew Feed*, BBC NEWS, Apr. 12, 2008, <http://news.bbc.co.uk/2/hi/africa/7342292.stm>.

156. See *id.*

157. ASIL Meeting, *supra* note 75.

158. See Pitman & Houreld, *supra* note 148.

159. ASIL Meeting, *supra* note 75.

deterrence, such prosecution is in fact a costlier option (and more logistically difficult).¹⁶⁰

Third, some capturing nations may have very little incentive in seriously dealing with the piracy threat,¹⁶¹ such as if they do not have a highly developed shipping industry or other strategic interests off the coast of Somalia. Finally, some capturing nations may simply want to avoid the hassle associated with prosecuting pirates, because of fear that piracy trials will be difficult, lengthy, and burdensome on that nation's judiciary.¹⁶² Thus, some capturing nations have advocated for options other than domestic prosecutions in their own courts, such as the creation of an ad hoc piracy tribunal and the transfer of pirates to regional partners, like Kenya.

B. *Ad Hoc Tribunals*

In the recent years, several ad hoc tribunals have been created to deal with a variety of different criminal situations. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda have been established by the United Nations to prosecute individuals responsible for heinous offenses committed during the civil wars in those countries.¹⁶³ The Special Court for Sierra Leone, the Iraqi High Courts, and the Extraordinary Chambers in the Courts of Cambodia are hybrid tribunals, created to bring individual accountability for the most serious offenses committed within those countries.¹⁶⁴ Thus, some have suggested the creation of an ad hoc piracy tribunal situated in a nation neighboring

160. See Kontorovich, *supra* note 7, (“[H]owever, in practice, the nations patrolling the Gulf of Aden have chosen not to prosecute pirates because of the anticipated difficulty and expense.”).

161. See Peppetti, *supra* note 17, at 111 (noting that states may lack the willingness to prosecute pirates because of “the absence of a nexus to the crime” and because of a “shortage of the necessary security and law enforcement authorities.”).

162. ASIL Meeting, *supra* note 75.

163. Peppetti, *supra* note 17, at 143–44 (describing the existence of regional tribunals exercising universal jurisdiction, such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda).

164. See, e.g., Peppetti, *supra* note 17, at 148 (describing the establishment and structure of the Special Court for Sierra Leone); Michael P. Scharf, *The Iraqi High Tribunal: A Viable Experiment in International Justice?*, 5 J. INT'L CRIM. JUST. 258 (2007); Göran Sluiter, *Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers*, 4 J. INT'L CRIM. JUST. 314 (2006).

Somalia to prosecute all captured pirates, avoiding the hassle of domestic prosecution and situations where pirates are released for lack of better options.¹⁶⁵

While this option seems theoretically attractive, it is doubtful whether it has enough support with key players, such as the United Kingdom or the United States, which have clearly indicated that they prefer to create regional partnerships and to have pirates prosecuted in domestic courts of such regional partners.¹⁶⁶ It is also uncertain whether an ad hoc piracy tribunal will ever be created in light of the high expense associated therewith, and the difficult logistics that always accompany the creation of an ad hoc tribunal.¹⁶⁷ An ad hoc piracy tribunal would need to find appropriate housing for its trial and detention facility; an acceptance from at least one host country; a trained judiciary, prosecution, and defense counsel; and to develop a uniform piracy law that would be applied to all captured pirates.¹⁶⁸ The difficulty of these tasks may outweigh the benefits of an ad hoc piracy tribunal, in light of the fact that some nations, like Kenya, may prove willing to prosecute pirates domestically.

C. *Regional Partnerships*

In 2008, the United Kingdom signed a Memorandum of Understanding with Kenya, whereby any captured pirates would be transferred to Kenya for prosecution in their civil courts under and under its criminal law.¹⁶⁹ Similarly, in 2009 the United States concluded a bilateral Memorandum of Understanding with Kenya, whereby any pirates captured by the United States

165. ASIL Meeting, *supra* note 75; *see also* Peppetti, *supra* note 17, at 148 (calling for the establishment of specialized regional tribunals vested with universal jurisdiction and thus the power to prosecute pirates).

166. As described below, the United Kingdom has already signed a Memorandum of Understanding with Kenya, whereby captured pirates would be transferred to Kenya for prosecution in the Kenyan domestic courts. *See infra* Part IV.C. The United States has also experimented with this idea by transferring captured pirates to Kenya in 2006, in a controlled test case. *See infra*, note 171. When the United States captured one of the Somali hijackers who had held U.S. captain Richard Phillips, in April 2009, there was some speculation as to whether the captured pirate would be tried in Kenya or brought to the United States for prosecution. *See* Kennedy, *supra* note 94.

167. ASIL Meeting, *supra* note 75.

168. *Id.*

169. *See* Kontorovich, *supra* note 7.

could be transferred to Kenya for prosecution.¹⁷⁰ To date, only one such prosecution of Somali pirates took place in Kenya, when the United States captured a group of pirates in 2006 and transferred them to Kenyan courts, where the pirates received seven-year prison sentences.¹⁷¹ Piracy-fighting countries like the United Kingdom and the United States may hope to solidify the transfer mechanism and to potentially develop other regional partnerships; however, the legality of such transfers is dubious under international law.

First, UNCLOS gives the capturing nation jurisdiction to prosecute pirates, but it does not vest such powers on third states.¹⁷² In fact, article 105 of UNCLOS provides that “every State may seize a pirate ship” on the high seas, but that the prosecution should take place in “the courts of the state which carried out the seizure.”¹⁷³ The drafting history of UNCLOS confirms that this article was intended to preclude transfers to third states.¹⁷⁴ Thus, the authority of a state to take military action against the Somali pirates in light of the recent U.N. Security Council resolutions may not translate into a corresponding authority to prosecute. While it is true that the SUA Convention allows for the transfer of pirates to third-party states for criminal prosecution, Somalia and many other countries are not members of the SUA Convention and its utility may prove limited.¹⁷⁵

Second, the capturing nation may be bound by various human rights conventions, like the International Covenant for Civil and Political Rights¹⁷⁶ or the European Convention on

170. See Gerry J. Gilmore, *Kenyan Government Agrees to Try Pirates Seized by U.S. Forces*, AM. FORCES PRESS SERV., Jan. 29, 2009, <http://www.defense.gov/news/newsarticle.aspx?id=52871>.

171. See Peppetti, *supra* note 17, at 110. In this case, ten Somali pirates attacked an Indian ship, the *Safina Al Bisaarat*. See *id.* Five days later, a U.S. ship captured the pirates, which, incidentally, marked the first capture of pirates by U.S. naval forces in generations. See *id.* at 89–90. Eight days after the pirates were captured, the United States experimented with the United Kingdom-Kenya form of partnership by transferring a group of captured pirates to Kenya for prosecution in 2006. See Kontorovich, *supra* note 7.

172. See Kontorovich, *supra* note 7.

173. UNCLOS, *supra* note 108, art. 105.

174. See Kontorovich, *supra* note 7; ASIL Meeting, *supra* note 75.

175. See Kontorovich, *supra* note 7.

176. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171.

Human Rights.¹⁷⁷ These nations also have a nonrefoulement obligation and may not transfer pirates to third states if there is a risk that pirates will be tortured in such third states or that they would not receive a fair trial.¹⁷⁸

Third, the law of the receiving state may complicate matters. In Kenya, for example, some scholars have interpreted domestic law to require that any arrested person be brought before a magistrate within twenty-four hours of his or her arrest.¹⁷⁹ In the case of pirates captured on the high seas, far off the Kenyan coast, this requirement may be difficult to satisfy, simply because the transfer of such pirates to Kenya may take several days.¹⁸⁰ Also in Kenya, evidence law does not provide for the introduction of witness statements into evidence, calling instead for the production of witnesses themselves at trial.¹⁸¹ This requirement may also be difficult to satisfy, as witnesses to the pirate attack may live or be stationed far from Kenya and may not be available to assist with the Kenyan trial.¹⁸² Other pirate states receiving pirates may not have adequate laws or procedures for handling piracy trials.¹⁸³ Thus, while regional partnerships represent an attractive option for the capturing state, these partnerships should be developed only after careful scrutiny of the receiving state's criminal system and actual ability to handle piracy trials.

D. *Maritime Organizations*

The presence of international maritime organizations may aid the fight against piracy by supplementing the prosecution options described above. The two main international maritime bodies involved in antipiracy efforts include the International

177. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

178. See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. TREATY DOC. NO. (1988), 1465 U.N.T.S. 85; Convention Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150.

179. ASIL Meeting, *supra* note 75.

180. *Id.*

181. See An Act of Parliament to Declare the Law of Evidence, (2005) Cap. 80 § 146 (Kenya).

182. See *id.* §§ 33–34.

183. For example, the *Alondra Rainbow* prosecution, see *supra* Part I, was almost undermined because the Indian Penal code had no adequate provisions against piracy. Peppetti, *supra* note 17, at 111.

Maritime Organization (“IMO”) and the International Maritime Bureau (“IMB”).¹⁸⁴

The IMO is described as “a specialized UN agency which is responsible for measures to improve the safety of international shipping and to prevent marine pollution from ships.”¹⁸⁵ It is currently composed of about 169 states, 75 intergovernmental organizations, and 58 nongovernmental organizations.¹⁸⁶ The IMO administers several international agreements, some of which are aimed at combating piracy.¹⁸⁷ The organization also contributes to the fight against piracy by requiring ships to have specific IMO numbers visibly displayed on their hulls, which in turn prevents the use and resale of phantom ships (ships that are hijacked, and then later repainted and reused by pirates or terrorists).¹⁸⁸ Moreover, the IMO has helped to raise security requirement for ships in ports, by enacting new, stricter regulations for port safety.¹⁸⁹ Finally, the IMO manages routing schemes for international shipping; these schemes can help to prevent piracy by rerouting smaller vessels from pirate-infested waters or by providing security to all ships sailing through such dangerous waters.¹⁹⁰

The IMB, on the other hand, is a branch of the International Chamber of Commerce and established a Piracy Reporting Centre in Malaysia in 1992.¹⁹¹ The centre collects piracy reports and broadcasts them to ships at sea; coast guards

184. See generally International Maritime Organization [IMO], <http://www.imo.org> (last visited Feb. 28, 2010); ICC, International Maritime Bureau, http://www.icc-ccs.org/index.php?option=com_content&id=27&Itemid=16 (last visited Feb. 28, 2010).

185. See Dahlvang, *supra* note 72, at 34.

186. IMO, Member States, http://www.imo.org/About/mainframe.asp?topic_id=315 (last visited Feb. 28, 2010); IMO, NGOs and IGOs, http://www.imo.org/About/mainframe.asp?topic_id=1639 (last visited Feb. 28, 2010).

187. See IMO, IMO Conventions, http://www.imo.org/Conventions/mainframe.asp?topic_id=148#5 (last visited Feb. 28, 2010). In fact, the International Maritime Organization (“IMO”) administers the International Convention for the Safety of Life at Sea. See *id.*

188. See John Parker, *Foiling the “Phantoms,”* TRAFFIC WORLD, Sept. 17, 2001, at 34; Press Release, IMO, Electric Fence for Ships Steps up Fight Against Pirates (Jan. 23, 2003), available at <http://www.iccwbo.org/icccbdd/index.html>.

189. The IMO’s International Ship and Port Facility Security Code entered into force in July 2004. See *Eradicating Piracy Together*, MALAYSIAN BUS., Jan. 16, 2004, at 45.

190. See R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 212–14 (2d ed. 1988); Dahlvang, *supra* note 72, at 36.

191. See ICC, IMB Piracy Reporting Centre, http://www.icc-ccs.org/index.php?option=com_content&id=30&Itemid=12 (last visited Feb. 28, 2010).

thus learn about piracy incidents quickly.¹⁹² Moreover, the centre is involved in locating hijacked ships and has made significant achievement in such efforts.¹⁹³

The above two international maritime organizations contribute to the fight against piracy through spreading valuable information. "IMB statistics are the primary source of information regarding maritime piracy, and analysis of these reports has resulted in specific recommendations for preventing pirate attacks. . . . The collection and distribution of information about such piracy movements and efforts remains crucial in continuing the fight against piracy."¹⁹⁴

All of the above mechanisms for combating piracy, however, may not be enough. This Article advocates the need for more aggressive measures in fighting Somali piracy; such aggressive measures may then be transplanted to any other region of the world where piracy may develop and thrive next. In particular, this Article argues that pirates should be equated with terrorists and fought under the same antiterrorist measures, laws, regulations, and conventions.

V. *THE NEED FOR MORE AGGRESSIVE MEASURES IN FIGHTING SOMALI PIRACY*

Pirates can be successfully fought in Somalia if two conditions are met. First, pirates should be captured and prosecuted routinely and treated like terrorists. Antiterrorist laws should help piracy-fighting countries to overcome legal hurdles currently posed by existing international law on piracy. Second, piracy in Somalia will thrive as long as lawlessness prevails in this war-torn region. Thus, the true solution to fighting piracy in Somalia will require rebuilding a stable society in Somalia.

A. *Piracy as Terrorism*

Pirates could be more effectively prosecuted if they were treated as terrorists. In fact, if pirates were treated as terrorist, a variety of antiterrorist conventions could become available as a

192. See Dahlvang, *supra* note 72, at 37–38.

193. See *id.* at 37.

194. *Id.*

basis for their criminal prosecution, such as SUA,¹⁹⁵ the Convention for the Suppression of Unlawful Seizure of Aircrafts,¹⁹⁶ the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,¹⁹⁷ the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents,¹⁹⁸ the International Convention Against the Taking of Hostages,¹⁹⁹ the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,²⁰⁰ the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf,²⁰¹ and the International Convention for the Suppression of Terrorist Bombings.²⁰² These antiterrorist conventions could either be relied upon directly, should the piracy act fit within the precise framework of one of these conventions, or simply as jurisdictional and procedural models for handling piracy captures and trials. Piracy, as this Article argues, constitutes terrorism on the high seas, and pirates should be treated as terrorists.

While it seems unlikely at the present time that the proceeds of Somali piracy fund any particular terrorist activity,²⁰³ the link between piracy and terrorism in general is real. For example,

195. SUA Convention, *supra* note 108.

196. Convention for the Suppression of Unlawful Seizure of Aircrafts, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

197. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 178.

198. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

199. International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205.

200. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Feb. 24, 1988, S. TREATY DOC. NO. 100-19 (1988), 1589 U.N.T.S. 474.

201. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, S. TREATY DOC. NO. 101-1 (1990), 1678 U.N.T.S. 304.

202. International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, S. TREATY DOC. NO. 106-6 (1999), 2149 U.N.T.S. 256.

203. While there are no conclusive reports that Somali piracy is fueling terrorism, U.S. officials believe that Al-Qaeda has operatives in Somalia. *See* Pitman, *supra* note 8.

pirate ships routinely seize weapons from victim vessels, and may be involved in the resale and smuggling of such weapons to terrorist groups.²⁰⁴ For example, in 2002, the Israeli Navy seized a vessel carrying a significant amount of weapons intended for the Palestinian Authority.²⁰⁵ A series of similar incidents allegedly involved Al-Qaeda, and some reports indicate that Osama bin Laden himself has access to at least twenty sea vessels.²⁰⁶ Moreover, explosives used to attack the U.S. embassies in Africa in 1998 and the nightclubs in Bali in 2002 were all apparently smuggled in on such ships.²⁰⁷ It is very difficult to fight pirates smuggling weapons on a state level because their ships routinely fly so-called flags-of-convenience,²⁰⁸ their ships may be registered through another state's shipping company,²⁰⁹ and the pirates themselves may come from a variety of different countries.²¹⁰ Thus, weapon smuggling pirates should be fought on an international level, exactly like terrorists, and should be prosecuted on the basis of antiterrorist international conventions.

Moreover, piracy in general has served to fund terrorist groups.²¹¹ While there is not a known direct link between piracy and terrorism funding in Somalia as of now, such a link has certainly existed in the recent past. In August 2003, an oil tanker sailing through the Straits of Malacca was hijacked by pirates, who demanded a significant ransom in return for the release of hostages.²¹² The IMB strongly believed that this attack was linked to Indonesia Aceh rebels who were motivated to fund their rebel movement.²¹³ In the Philippines, a terrorist group known as Abu

204. See Pitman, *supra* note 8.

205. See Philip Cornford & Sarah Crichton, *The Ships That Died of Shame*, SYDNEY MORNING HERALD, Jan. 14, 2003, at 13; Dahlvang, *supra* note 72, at 31.

206. See Dahlvang, *supra* note 72, at 32.

207. See *id.*

208. The flags-of-convenience issue is especially problematic because states on the flags have no control over the vessels, and some states have little incentive to contribute to any antiterrorism or antipiracy efforts because they are actually land-locked. See *id.* at 31.

209. See *id.*

210. See *id.*

211. See *id.* at 32.

212. See Delphine Soulas, *Poverty Stirs Turbulence in Asian Waters; Attacks on Ships Triple Since '93*, WASH. TIMES, Oct. 10, 2003, at A17.

213. See *New Brand of Piracy Threatens Oil Tankers in Malacca Straits*, ICC, Sep. 2, 2003, <http://www.icc.wbo.org/iccdfid/index.html>.

Sayyaf regularly kidnapped foreigners at sea and demanded multimillion dollar ransoms.²¹⁴ At other times, pirates have gone after ships carrying valuable cargo, which suggests that pirates may be paying off port and government officials who supply them with ship manifests, that detail the ships' cargo, and then suppress investigations into the captured ships and cargo.²¹⁵ Thus, pirates are able to sell the ships and cargo seized for handsome profit, which in turn may fund specific terrorist activities or groups.

On a purely theoretical level, pirates and terrorists differ in one aspect: the latter seem to function on the basis of a particular political or religious ideology, while the former, at least in Somalia, seem driven by purely financial gains. Pirates and terrorists however proffer many similarities. First, both piracy and terrorism are a form of organized crime, with powerful masterminds and entire rings of executioners.²¹⁶ In terms of fighting piracy and terrorism, going after the executioners may not do enough and instead, one may have to focus on the masterminds. Thus, when going after the Somali pirates, countries like the United Kingdom and the United States need to be able to go after the masterminds—the Somali warlords hiding behind the lawlessness of mainland Somalia. Customary international law does not provide capturing nations with the authority to enter Somalia's territory to arrest piracy masterminds, and while some of the 2008 U.N. Security Council resolutions go as far as to authorize capturing nations to enter Somali territorial waters and the Somali land,²¹⁷ this option has not been exercised yet by any piracy fighting nation.²¹⁸ Some antiterrorist conventions, however, would authorize capturing

214. Abbu Sayyaf is an Islamist separatist movement linked to Al-Qaeda, as well as another organization responsible for the 2002 Bali attacks. See David E. Kaplan et al., *The Shadow over the Summit*, U.S. NEWS & WORLD REP., Oct. 20, 2003, at 29.

215. See Dahlvang, *supra* note 72, at 32.

216. See Donald J. Puchala, *Of Pirates and Terrorists: What Experience and History Teach*, 26 CONTEMP. SECURITY POL'Y 1, 19 (2005).

217. See, e.g., S.C. Res. 1851, *supra* note 120, ¶ 2.

218. It will be interesting to observe whether the United States chooses to go after piracy masterminds and enter the Somali land in the wake of the hijacking of the U.S. ship, *Maersk Alabama*, and its captain, Richard Phillips, in April 2009. In fact, Vice Admiral William Gortney recently stated that "[t]he ultimate solution for piracy is on land." *Pentagon Looks to Move Battle Against Pirates Ashore*, CNN, Apr. 14, 2009, <http://www.cnn.com/2009/POLITICS/04/14/obama.pirates/>.

nations to enter Somalia in pursuit of the operation masterminds, improving the limited legal tools that are available to nations fighting piracy.²¹⁹ Second, both piracy and terrorism exist on a supranational level; their executioners function privately, beyond the sponsorship of any particular state, and their targets come from a variety of different states.²²⁰ The Somali pirates have gone after ships of many different nationalities so far, and the taken hostages have come from a myriad of different countries.²²¹ Terrorists, likewise, have operated against many different nations and have harmed nationals of many different states.²²² In fighting pirates, similarly to fighting terrorists, nations may have to come together to form coalitions, and to rely on international law for tools that will provide them jurisdiction to go after and try captured pirates. Third, both terrorists and pirates seem to thrive in lawless regions—recently, terrorists have found safe haven in the remote mountains of Afghanistan and Pakistan,²²³ and pirates have flourished in war-torn Somalia.²²⁴ When dealing with the piracy problem, countries may need to rely on international law to find authority to conduct air or land-based military initiatives against pirates/terrorists.

Because the fight against pirates parallels the fight against terrorists, countries need to be able to treat pirates exactly as

219. Some of the more recent antiterrorist conventions that could be used in the fight against piracy, either as models or as treaties to be directly relied upon, include the Convention for the Suppression of Unlawful Seizure of Aircrafts, *supra* note 196, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra* note 197, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *supra* note 198, the International Convention Against the Taking of Hostages, *supra* note 199, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra* note 200, the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, *supra* note 201, and the International Convention for the Suppression of Terrorist Bombings, *supra* note 202.

220. See Douglas R. Burgess Jr., *The Dread Pirate Bin Laden*, *LEGAL AFF.*, July–Aug. 2005, at 32, 32–33.

221. See, e.g., Kontorovich, *supra* note 7 (remarking that “pirates make no discrimination among vessels” and that “[a]nything is fair game”).

222. See Adam Roberts, *The Changing Faces of Terrorism*, BBC, Aug. 27, 2002, http://www.bbc.co.uk/history/recent/sept_11/changing_faces_01.shtml.

223. See Alan Cowell, *Britain to Add 700 Troops to Fight in Afghanistan*, *N.Y. TIMES*, Apr. 30, 2009, at A12.

224. See *Pentagon Looks to Move Battle Against Pirates Ashore*, *supra* note 218.

terrorists, in order to widen their range of available legal, military and political strategies. One of such strategies involves relying on antiterrorist conventions, like SUA, to find justification for the apprehension of pirates on Somali land or for the prosecution of pirates in Kenya or other regional partners.

B. *Rebuilding Somalia and Its Institutions*

Finally, piracy will thrive in Somalia as long as lawlessness and poverty prevail in this war-torn country.²²⁵ Piracy exists in Somalia because many people are poor and cannot find adequate employment to support their families.²²⁶ Piracy also exists in Somalia because there is no central government that could fight pirates: the country has had no government, no organized army or police force, and no functioning judiciary for almost two decades.²²⁷ In such a cowboy climate, pirates are able to freely dock their ships in Somali ports and escort their hostages onto Somali land without any fear of arrest or other repercussions by the Somali government.²²⁸ Thus, fighting piracy off the coast of Somalia may also require rebuilding Somalia.²²⁹ Countries that have felt threatened by piracy may need to lobby the U.N. for funds and support in rebuilding the political institutions and infrastructure of Somalia, and may need to invest their own time and effort in recreating a stable and peaceful

225. Vice Admiral William Gortney, commander of U.S. Naval Forces Central Command and the Combined Maritime Forces, recently stated that “[p]iracy around the world stems from activity where there is lawlessness, lack of governance, economic instability; things of that nature. And wherever you have that, you’re going to have criminal activity at sea.” *Id.*

226. See *Somalia: Addressing the Root Causes of Piracy and Warlordism*, INT’L LABOUR ORG., Oct. 13, 2009, http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Feature_stories/lang-en/WCMS_115375/index.htm.

227. See Pitman, *supra* note 8.

228. See *id.*

229. Many analysts have already argued that piracy cannot be fought off the coast of Somalia by security alone, and the deputy commander of the U.S. Africa Command in Germany has recently stated that the only long-term solution would be to resolve the political instability in Somalia. See *Seychelles Coast Guard Arrests 9 Suspected Pirates*, *supra* note 90. Similarly, Mary Yates, a senior U.S. diplomat serving as African deputy for civil-military activities, recently stated that “[w]e have to get at the root causes, and the root causes are on the land.” *Id.*

Somali society. Otherwise, pirates will continue to thrive.²³⁰ Already, piracy is developing off the coast of Nigeria, another relatively unstable country.²³¹ Piracy may similarly spread to other unstable regions, and we may face a return of the seventeenth century paradigm: wherever there is water, pirates thrive.²³² Ensuring peace and stability in Somalia, and possibly in other regions, may be the most significant and comprehensive step in fighting piracy.

C. *Cautionary Note: Is the Fight Against Piracy Purely Theoretical?*

Despite the possible responses to the piracy threat in Somalia and elsewhere, as outlined above, the scope of this Article may admittedly have more academic than practical value. The Author firmly believe that pirates are dangerous and that world powers like the United States should use more aggressive means in combating sea terrorists. Thus, this Article presents what is the most ideal response to the piracy threat. However, in reality, this view may have little practical appeal for countries facing the piracy issue, for a variety of pragmatic, geopolitical, financial, and strategic reasons.

First, fighting pirates on a serious military level, as advocated above, is incredibly costly. The United Kingdom, the United States, or any other maritime force attempting to aggressively wage a war on piracy in Somalia or elsewhere would have to increase its naval presence in the affected zone. To that end, piracy fighting countries would have to deploy more ships in piracy-infested seas, equip such ships with appropriate weapons and pirate tracking devices, and risk marine and soldier lives by instructing them to engage in combat against the pirates. Such efforts carry an enormous price tag,²³³ especially as compared to the low effort and cost attached to the paying of ransoms.²³⁴ Thus, from a financial standpoint, fighting pirates may not be attractive, and countries may just continue to pay multi-million

230. See Pitman, *supra* note 8 (arguing that because the developed countries, including the United States, have not undertaken significant efforts to help Somalia rebuild itself, now its “anarchy . . . has come back to haunt.”).

231. See, e.g., *Nigeria: Piracy Report Says Nigerian Waters the Most Deadly*, IRIN NEWS (Nairobi, Kenya), July 27, 2004, <http://www.irinnews.org/Report.aspx?ReportId=50843>.

232. See Burgess, *supra* note 20, at 307.

233. ASIL Meeting, *supra* note 75.

234. *Pentagon Looks to Move Battle Against Pirates Ashore*, *supra* note 218.

dollar ransoms, as long as pirates keep releasing hostages without any violence.

Second, piracy always thrives in lawless regions, like Somalia. As advocated above, eradicating piracy may entail the rebuilding of stable societies and the reestablishment of order, so that pirates no longer enjoy the immunity of chaotic, unstable, government-less areas.²³⁵ World powers like the United States simply may not be willing or able to help every troubled zone in the world. The United States has contributed a significant number of soldiers to internationally-organized humanitarian missions over the last two decades;²³⁶ thus, it may simply not have enough manpower or political willingness to engage in every single lawless region. The true piracy eradicating solution (the rebuilding of stable societies) may not be a feasible goal.

Finally, from a purely opportunistic standpoint, countries like the United States or the United Kingdom may not have enough strategic incentive to go after pirates, as long as U.S. or British ships are not often attacked, and as long as U.S. or British interests are not more directly threatened. For example, were it firmly proven that pirates harbored dangerous terrorists or directly aided groups like Al-Qaeda, the United States and the United Kingdom would surely rethink their strategy and their efforts against pirates. Until such times, naval powers may continue to employ meager efforts in the fight against piracy, and, consequently, piracy may continue to thrive uninterrupted and unhindered.

Because of the dangers associated with piracy, the Author will continue to advocate their view in academic forums, in perhaps vain hopes of catching a political eye and attracting more concrete support. As stated earlier in this Article, pirates are sea terrorists and should be fought with full force.²³⁷

CONCLUSION

Modern-day piracy, currently thriving in Somalia and possibly spreading to other regions of the world, is a serious

235. *Id.*

236. See NINA M. SERAFINO, CONG. RESEARCH SERV., PEACEKEEPING AND RELATED STABILITY OPERATIONS: ISSUES OF U.S. MILITARY INVOLVEMENT 4–5 (2006), available at <http://fpc.state.gov/documents/organization/64961.pdf>

237. See discussion *supra* Part V.A.

threat to all naval nations, their ships and crewmembers, as well as their cargo.²³⁸ Pirates today operate like terrorists—they go after any prey that they estimate easy to capture, irrespective of the nationality of the ship or its crew members.²³⁹ Thus, they function in a supranational sphere, as a global threat to all nations and a lingering menace on all seas. Moreover, a serious danger looms that pirates may become linked to other terrorist groups.²⁴⁰ All countries, and especially those with a significant naval presence, should undertake serious efforts to fight piracy in Somalia and ensure that it does not reemerge in other lawless regions. Pirates need to be fought in a serious manner: with routine capture, prosecution, and punishment in the courts of piracy-fighting states. In order to accomplish these goals, piracy-fighting countries should rely on antiterrorist conventions as a legal basis for the battle against piracy and continue to cooperate in the struggle against the Somali, and other, pirates. Finally, piracy-fighting countries may need to undertake additional efforts to rebuild Somalia and to ensure that such lawlessness does not occur in other regions of the world. In fact, piracy, like terrorism, thrives in disordered states, war-torn regions, and impoverished areas.²⁴¹ Thus, the best long-term solution against piracy may be the developed world's commitment to reestablishing functioning order in developing and failed states, like Somalia.

238. See Buhler, *supra* note 49, at 61.

239. See Burgess, *supra* note 220.

240. See Dahlvang, *supra* note 72, at 18.

241. See Rami G. Khouri, Op-Ed, *Somali Piracy Reflects a Troubling World*, CHI. TRIB., Nov. 28, 2008, at 67.