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# Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes

Joseph M. Isanga

*Concordia University School of Law, jisanga@cu-portland.edu*

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# COUNTERING PERSISTENT CONTEMPORARY SEA PIRACY: EXPANDING JURISDICTIONAL REGIMES

JOSEPH M. ISANGA\*

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\* Associate Professor of International Law, *Ave Maria School of Law*, LL.B, *first-class honors* and *first-in-class*, *Makerere University*, Kampala, Uganda; LL.M., *summa cum laude*, *University of Notre Dame*, J.S.D., *summa cum laude*, *University of Notre Dame*. I would like to thank my research assistant, Branden Henderson, for his invaluable assistance with this Article.

## INTRODUCTION

The international community has witnessed unprecedented incidents of piracy with increasingly blatant, sophisticated, daring, brazen, unrelenting, seemingly intractable, and audacious threats<sup>1</sup> to international law, security at sea, and global trade.<sup>2</sup> These incidents have frequently occurred in parts of the world where lawlessness prevails on land and spills into the sea, due in part to failures of the state.<sup>3</sup> According to the International Maritime Organization (IMO), the number of acts of piracy and armed robberies perpetrated against ships reached 5062 by June, 2009, up 36 since May, 2009, with most incidents occurring off the coast of Africa.<sup>4</sup> With the exception of 2005, the number of piracy incidents has increased dramatically each year.<sup>5</sup> On January 16, 2009, the International Maritime Bureau

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1. See, e.g., S.C. Res. 1851, Preamble, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (“Pirate attacks off the coast of Somalia have become more sophisticated and daring and have expanded in their geographic scope, notably evidenced by the hijacking of the *M/V Sirius Star* 500 nautical miles off the coast of Kenya and subsequent unsuccessful attempts well east of Tanzania.”).

2. International Maritime Organization, Introduction to IMO, [http://www.imo.org/about/mainframe.asp?topic\\_id=3](http://www.imo.org/about/mainframe.asp?topic_id=3) (last visited June 3, 2010) (reporting that approximately ninety percent of world trade is conducted through maritime channels); see Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT’L L. 1, 16 (2007) (reasoning that states are likely to continue to regard pirates as global outlaws due to the importance of maritime channels to world trade).

3. ICC Commercial Crime Services, International Chamber of Commerce, *Pirate Attacks Off Somalia Already Surpass 2008 Figures*, May 12, 2009, [http://www.icc-ccs.org/index.php?option=com\\_content&view=article&id=352:pirate-attacks-off-somalia-already-surpass-2008-figures&catid=60:news&Itemid=51](http://www.icc-ccs.org/index.php?option=com_content&view=article&id=352:pirate-attacks-off-somalia-already-surpass-2008-figures&catid=60:news&Itemid=51) (reporting that the total number of pirate attacks in the Gulf of Aden and off the east coast of Somalia for the first four months of 2009 surpassed the figure for all of 2008). In all of 2008, there were 111 incidents, including the hijacking of 42 vessels. *Id.* However, in the first four months of 2009 alone, there were 29 successful hijackings out of 114 attempted attacks. *Id.* Furthermore, in 2008, 815 crewmembers were taken hostage in the Gulf of Aden and off the east coast of Somalia. *Id.* In the first four months of 2009, the number of hostages had already reached 478. *Id.* Incidents increased in spite of the heightened presence of international navies sweeping the waters off the Somali coast. *Id.* The level of attempted attacks showed that the pirates were unperturbed by this presence and, if anything, had stepped up operations in order to secure a higher success rate. *Id.*

4. INT’L MARITIME ORG., REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS: ACTS REPORTED DURING JUNE 2009 (MSC.4/Circ.138) ¶ 2 (Jul. 7, 2009), available at [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D25980/138.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25980/138.pdf).

5. INT’L MARITIME ORG., REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT 2005 (MSC.4/Circ.81) ¶ 4 (Mar. 22, 2006) [hereinafter IMO ANNUAL REPORT 2005], available at [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D14323/81-colour.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D14323/81-colour.pdf) (stating that the number of incidents “reported to the Organization to have occurred or to have been attempted in 2005, was 266, a decrease of 64 (19%) over the figure for 2004”). In 2005, the IMO reported that “[o]ver the period under review . . . [t]here was an increase in the number of incidents from 13 to 49 in East Africa and from 41 to 51 in the Indian Ocean, over

(IMB) reported an unprecedented 11% increase in the number of incidents of piracy or armed robbery at sea committed worldwide between 2007 and 2008.<sup>6</sup> Of the 293 incidents that the IMB recorded for that year, 111 (38%) occurred off the coast of Somalia or in the Gulf of Aden.<sup>7</sup>

Meanwhile, navies have been deployed, and some captured pirates have been sent to third-party countries to be prosecuted, but most have been released.<sup>8</sup> Two issues have emerged from the current situation. How should nations deal with the piracy problem in general? What rights does international law grant to a suspected pirate? The U.N. Security Council is concerned that Somalia's lack of a domestic legal structure to deal with piracy has "hindered more robust international action against the pirates off the coast of Somalia" and has "led to pirates being released without facing justice."<sup>9</sup> Somalia's responsibility for creating a framework is underscored by the Security Council's note that

the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation.<sup>10</sup>

Available statistics underscore the magnitude and consequences of this legal labyrinth. Official figures released by the U.S. Navy indicate that out of the 238 suspected pirates investigated by navies operating off the coasts of Somalia, barely half were prosecuted, and most were

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the 2004 figures." *Id.* ¶ 5. Moreover, while the IMO observed a "decrease of 25 (9%) over the figure for 2005," the organization indicated in its 2007 annual report that there was an "increase of 41 (17%) over the figure for 2006." Compare INT'L MARITIME ORG., REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT 2006 (MSC.4/Circ.98) ¶ 4 (Apr. 13, 2007) [hereinafter IMO ANNUAL REPORT 2006], available at [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D18566/98.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D18566/98.pdf), with INT'L MARITIME ORG., REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT 2007 (MSC.4/Circ.115) ¶ 4 (Apr. 10, 2008) [hereinafter IMO ANNUAL REPORT 2007], available at [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D22585/115.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D22585/115.pdf).

6. ICC Commercial Crime Services, International Chamber of Commerce, *IMB Reports Unprecedented Rise in Maritime Hijackings*, Jan. 16, 2009, [http://www.icc-ccs.org/index.php?option=com\\_content&view=article&id=332:imb-reports-unprecedented-rise-in-maritime-hijackings&catid=60:news&Itemid=51](http://www.icc-ccs.org/index.php?option=com_content&view=article&id=332:imb-reports-unprecedented-rise-in-maritime-hijackings&catid=60:news&Itemid=51).

7. *Id.*

8. See Jon Ungoed-Thomas & Marie Woolf, *Navy Releases Somali Pirates Caught Red-Handed*, TIMES ONLINE, Nov. 29, 2009, <http://www.timesonline.co.uk/tol/news/world/africa/article6936318.ece> (observing that pirates captured by the Royal Navy were often released because they were not captured "in the act of piracy").

9. S.C. Res. 1851, *supra* note 1.

10. *Id.* (abbreviation omitted).

released.<sup>11</sup> In April, 2008, after North Atlantic Treaty Organization (NATO) forces rescued twenty fishermen from pirates who seized a Belgian ship, the forces had to release the pirates because they had no legal authority to arrest them.<sup>12</sup> It is clear that no nation seems interested in playing the role of “global policeman.”<sup>13</sup> Pirates, particularly those operating off the coast of Somalia, have shown utter disregard for the law, largely because existing enforcement mechanisms have been deficient and the international community has not demonstrated a resolute will to reform piracy law.

When ransoms are paid to pirates or when captured pirates are released, the international community inadvertently encourages the persistence of piracy with impunity, and it is “unlikely that piracy can be stopped if pirates are not prosecuted and punished.”<sup>14</sup> Faced with a new generation of pirates, it is not longer sufficient to simply appeal to universal jurisdiction. Whether a pirate can be prosecuted depends on where the pirate is captured, the nationality of the pirate, the nationality of the ship that arrests him, and the circumstances under which the pirate is arrested.<sup>15</sup> These circumstances call into question the adequacy of enforcement mechanisms currently in place to combat international piracy, as there have been few normative and procedural developments. Many of these challenges are rooted in the definition of piracy in international instruments, the level of international will to enforce piracy law, and the jurisdictional limitations of prosecuting piracy.<sup>16</sup> The legal regime currently in place under both international and domestic criminal law is not sufficiently comprehensive to properly hold pirates responsible.<sup>17</sup> Although the 1982 United Nations Convention on the Law of the Sea (UNCLOS) mandates that nations utilize universal jurisdiction to

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11. Oliver Hawkins, *What To Do With A Captured Pirate*, BBC NEWS, Mar. 10, 2009, <http://news.bbc.co.uk/2/hi/7932205.stm>.

12. Todd Pitman & Katharine Houreld, *NATO Forces Free 20 Fishermen; Sea Bandits Seize Belgian Ship*, BOSTON GLOBE, Apr. 19, 2009, at A3.

13. Eugene Kontorovich, Opinion, *Invoke Universal Jurisdiction to Prosecute Pirates Worldwide*, NAT'L L.J., May 11, 2009, at 17.

14. Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, ASIL INSIGHTS, Feb. 6, 2009, <http://www.asil.org/insights090206.cfm>.

15. Hawkins, *supra* note 11.

16. See Donald R. Rothwell, *Maritime Piracy and International Law*, Crimes of War Project, Feb. 24, 2009, <http://www.crimesofwar.org/onnews/news-piracy.html> (arguing that the legal definition of piracy should be revised and that the international community should work together to formulate a coordinated approach to piracy).

17. See *id.* (noting that some states' criminal justice systems are not equipped to adequately deal with piracy).

prosecute pirates on the high seas,<sup>18</sup> few nations have actually done so.<sup>19</sup> When the responsibility to prosecute belongs to every state, the practical effect is that no state seems to accept it, apart from those states that have immediate national interests at stake.<sup>20</sup>

As pirates become more violent and audacious, the international response has been to send more navies to the effected region.<sup>21</sup> In the short term, the presence of ships increases the speed with which pirates can be caught or dissuaded, but in the long term, the ships may prove to be insufficient, risky,<sup>22</sup> and, at best, only an ad hoc solution.<sup>23</sup> In fact, in October, 2009, it was acknowledged that “[a]lthough the international naval forces have stepped up patrols in the Gulf of Aden this year, relatively few of the pirates detained have faced trial because of the legal complexities involved.”<sup>24</sup>

Granted, international navies have had some success in containing piracy, especially off the coast of Somalia where warships established a safe shipping lane and escorted ships with food aid into the country.<sup>25</sup> Some have suggested that the long-term solution to piracy near Somalia is an effective government coupled with a well-

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18. United Nations Convention on the Law of the Sea, art. 105, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLoS].

19. See Kontorovich, *supra* note 14 (explaining that states have been hesitant to exercise jurisdiction over pirates due to the difficulties and expenses associated with prosecution).

20. See *id.* (highlighting the fact that most instances of military action against pirates have been defensive acts).

21. See *Pirates Hit Navy Ship ‘In Error’*, BBC NEWS, Oct. 7, 2009, <http://news.bbc.co.uk/2/hi/africa/8294858.stm> (documenting the increased presence of naval ships from Britain, France, Germany, and Italy in waters adjacent to Somalia).

22. For example, pirates threatened to “execute the whole crew,” of a Chinese vessel—the *De Xin Hai*—if the Chinese Navy tried to rescue the crew rather than pay a ransom. *China Vows to Free Hijacked Ship*, BBC NEWS, Oct. 20, 2009, <http://news.bbc.co.uk/2/hi/asia-pacific/8315630.stm>.

23. In fact, pirates are becoming more ubiquitous and evasive of navies in their operations. *Somali Pirates Snare Chinese Ship, Crew*, BOSTON GLOBE, Oct. 20, 2009, at A3. They use sophisticated equipment and so-called larger “mother ships” to enable them to strike hundreds of miles offshore. *Id.* A recent example involved the aforementioned Chinese cargo ship *De Xin Hai*, which Somali pirates attacked in the Indian Ocean about 700 miles (1100 kilometers) east of the Somali coastline, the farthest from shore pirates have ever struck. *Id.*

24. *Pirates Hit Navy Ship ‘In Error’*, *supra* note 21.

25. Paul Reynolds, *Rules Frustrate Anti-Piracy Efforts*, BBC NEWS, Dec. 9, 2008, <http://news.bbc.co.uk/2/hi/7735144.stm>. Several other success stories have been reported: “The Royal Navy . . . shot and killed two pirates and captured others. The French staged a daring capture of pirates who had taken over a yacht. The Indian navy thwarted two attempted hijacks, though the pirates in both cases got away.” *Id.* Additionally, the U.S. Navy successfully rescued a ship captain, and in the process killed three pirates and captured a fourth. *US Captain Rescued From Pirates*, BBC NEWS, Apr. 13, 2009, <http://news.bbc.co.uk/2/hi/7996087.stm>.

resourced coast guard.<sup>26</sup> Others have proposed that western countries deploy their navies to the area, but this prospect is unlikely because those countries have no legal obligation to assist the international community in such a manner.<sup>27</sup> Alternatively, some argue that commercial ships should be able to arm themselves in order to adequately respond to increasingly well-armed pirates, but this proposal has also been discouraged.<sup>28</sup> In the end, no single country's navy can be relied upon to constitute an international naval police force. Even if one nation were to take on that responsibility, it is extremely difficult to effectively police the entire Indian Ocean, to say nothing of other parts of the globe where piracy is prevalent. For the most part, states have limited their actions to negotiating with pirates in exchange for the release of hostages, but have gone no further.<sup>29</sup>

International law enforcement—even if only complementary to national and regional efforts—is particularly helpful in cases where piracy occurs in waters off the coasts of developing countries where local law enforcement is nominal, nonexistent, or ineffective.<sup>30</sup> Indeed, the IMB attributes the rise in incidents of piracy, in part, to “the lack of proper law enforcement.”<sup>31</sup>

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26. See Hawkins, *supra* note 11 (forewarning that until a solution is found, holding pirates accountable will be difficult).

27. See Kontorovich, *supra* note 13 (recognizing that few countries want to play the role of “global policeman”).

28. The IMO argues that “[c]arriage of arms on board ship may encourage attackers to carry firearms thereby escalating an already dangerous situation, and any firearms on board may themselves become an attractive target for an attacker.” INT’L MARITIME ORG., PIRACY AND ARMED ROBBERY AGAINST SHIPS: GUIDANCE TO SHIPOWNERS AND SHIP OPERATORS, SHIPMASTERS AND CREWS ON PREVENTING AND SUPPRESSING ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS (MSC/Circ.623/Rev.3) Annex, ¶ 46 (May 29, 2002).

29. The IMO has stated: “As these [pirates] are criminals under both international law and most national laws, this task will generally fall to the security forces of the States involved. Governments should avoid engaging in negotiations with these criminals and seek to bring perpetrators of piracy and armed robbery against ships to justice. Negotiating with criminals in a case regarding hijacking of a ship may encourage potential perpetrators to seek economic revenue through piracy.” INT’L MARITIME ORG., PIRACY AND ARMED ROBBERY AGAINST SHIPS: RECOMMENDATIONS TO GOVERNMENTS FOR PREVENTING AND SUPPRESSING PIRACY AND ARMED ROBBERY AGAINST SHIPS (MSC.1/Circ.1333) Annex, ¶ 2 (June 26, 2009).

30. See Leticia M. Diaz & Barry Hart Dubner, *An Examination of the Evolution of Crimes at Sea and the Emergence of the Many Legal Regimes in Their Wake*, 34 N.C. J. INT’L L. & COM. REG. 521, 524 (2009) (citing INTERNATIONAL MARITIME BUREAU, INTERNATIONAL CHAMBER OF COMMERCE, PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT—2007, at 24 (2008) [hereinafter IMB ANNUAL REPORT 2007] (predicting that the only way to prevent additional acts of piracy is through the intervention of the international community).

31. IMB ANNUAL REPORT 2007, *supra* note 30, at 24.

The United Nations has responded with ad hoc resolutions to help address the law enforcement lacuna. For instance, a provision in the UNCLOS prohibits states from engaging in the hot pursuit of suspected pirates in the territorial waters of another coastal state.<sup>32</sup> Provisions such as this one illustrate how the UNCLOS is premised upon a traditional understanding of piracy—one that assumes that the state system works effectively and that a state can enforce its own laws in its territorial sea.<sup>33</sup> However, as recent events demonstrate, this is often not the case. Pirates have become organized, technologically advanced, and versatile<sup>34</sup>—a development that explodes traditional understandings of piracy. Hence, there is an urgency for international law to more adequately respond to this formidable phenomenon that has evolved in nature and scope. Ad hoc U.N. Resolutions have proven to be temporary and limited in their long-term effectiveness because they apply only in a given situation.<sup>35</sup>

Another misguided response has been the over-reliance on third states (those not directly involved) to prosecute suspected pirates.<sup>36</sup> This practice, however, is a subject of concern because of due process issues prevalent in these third states.<sup>37</sup> What constraints are faced by third states—which rarely have a large stake in maritime trade—when it comes to prosecution of pirates?

As long as pirates perceive that the international community is unwilling or lacking the capacity to prosecute, piracy will continue to thrive. It is evident that piracy threatens international trade and maritime life throughout the world. Not only does piracy cause substantial disruption and loss to the world economy, which is heavily reliant on maritime shipping, it also leads to escalating costs associated with increasingly steep ransom demands and higher

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32. UNCLOS, *supra* note 18, art. 111, ¶ 3.

33. See Rothwell, *supra* note 16 (explaining that international piracy law tasks countries with policing acts of piracy in their own territorial waters).

34. Saeed Ahmed, *High-Tech Pirates Are No Romantic Figures*, CNN.COM, April 29, 2008, <http://www.cnn.com/2008/CRIME/04/29/pirates/index.html>. Pirates charge against or escape from their targets using high-speed vessels linked to a special mother vessel. *Id.* They wear night-vision goggles, carry rocket launchers, and use global-positioning devices for navigation. *Id.*

35. See Rothwell, *supra* note 16 (criticizing the fact that the U.N. Security Council's Resolutions only dealt with piracy in Somali waters).

36. See Hawkins, *supra* note 11 (discussing agreements entered into by Kenya and both the United States and the European Union which provide that Kenya will prosecute pirates).

37. See *id.* (discussing concerns raised by human rights groups as to the adequacy of Kenya's justice system).

insurance premiums.<sup>38</sup> This Article recommends various normative and procedural reforms and, in particular, advocates for the expansion of the jurisdiction of the International Tribunal on the Law of the Sea (ITLOS) as a permanent forum for the prosecution of suspected pirates.

To this end, the Article consists of six parts. Part I evaluates the common practice of outsourcing piracy enforcement and the various legal and non-legal problems that follow as a result of such practice. Part II analyzes the definition of piracy in the context of international law instruments and addresses the relevant jurisdictional implications of that definition. Part III focuses on the response of the United Nations to piracy, and, in particular, the U.N. Security Council's efforts in Africa. Part IV discusses the ITLOS and the respective roles that international jurisdiction and universal jurisdiction play in the prosecution of piracy. Part V looks at the methods by which piracy law is enforced on both national and local levels, with special attention to Somalia. Lastly, Part VI recommends that particular areas of piracy law be expanded, and ultimately calls for broader approaches to the problem in order to build a more robust system of enforcement.

### I. OUTSOURCING PIRACY LAW ENFORCEMENT

Under the existing legal framework, piracy is uniquely situated in international law. When a pirate is captured on the high seas outside the territory of a particular state, the municipal laws of the capturing state—not international laws—determine how the pirate will be punished.<sup>39</sup> This reliance on municipal enforcement has led to notable failures, one being the rarity in which piracy cases are

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38. There is no quantitative research available regarding the total cost of global piracy, and estimates vary widely. Stephanie Hanson, *Combating Maritime Piracy*, COUNCIL ON FOREIGN RELATIONS, Jan. 7, 2010, <http://www.cfr.org/publication/18376/>. Experts disagree over whether insurance premiums, freight rates, and rerouting costs should be considered together with the cost of ransoms. *Id.* Some analysts suggest that global piracy costs \$1 billion a year, while others estimate the cost to be as high as \$16 billion. *Id.*

39. See UNCLOS, *supra* note 18, art. 105 (“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 or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.”). *But see* Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1, 10–11 (2008) (“Although pirates are *punished* under the municipal law of the state that holds them, their *capture* outside the jurisdiction of a state is made possible by international law”).

actually brought in municipal courts. For example, in 2009, a U.S. District Court tried a suspected pirate involved in the dramatic hijacking of the M/V *Maersk Alabama*—the first piracy prosecution in the United States since the late 19th century.<sup>40</sup> The rarity of such cases highlights the complete failure of international law as a response to piracy. Although hundreds of pirates have been caught by the coalition led by the North Atlantic Treaty Organization (NATO) that patrolled the Gulf of Aden, only a few have been brought back to the capturing nation to be prosecuted.<sup>41</sup> One Danish frigate, after seizing a pirate vessel, released the pirates shortly afterward, claiming that it did not know what to do with them.<sup>42</sup> In another case, the Royal Navy released pirates after confiscating their equipment.<sup>43</sup>

There are several explanations for the failure to bring pirates to justice. Not only is prosecuting pirates burdensome, entailing innumerable logistical difficulties, it is also expensive and time-intensive as it can involve novel legal questions.<sup>44</sup> Additionally, some states are reluctant to prosecute pirates because their legal regimes are inadequate or because piracy presents delicate political considerations.<sup>45</sup> Although these obstacles are not insurmountable, they still effectively deter states from prosecuting pirates, particularly when states are not immediately affected by piracy.<sup>46</sup>

#### A. *Obstacles to Working with Third Countries*

One of the responses to the challenges of enforcement of piracy law has been to enter into agreements with third countries, mainly developing countries, to prosecute suspected pirates.<sup>47</sup> While there are doubts about the long-term sustainability of this approach,<sup>48</sup> there are also legal concerns. For instance, “[t]he legality of transfers from outside capturing states to third states is thrown into doubt by the piracy provisions of [the UNCLOS].”<sup>49</sup> The drafting history reveals

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40. Kontorovich, *supra* note 13; *see also* Hicks v. Waterman S.S. Corp., No. H-09-1601, 2009 WL 4572776 (S.D. Tex. Sept. 16, 2009).

41. Kontorovich, *supra* note 13.

42. *See* Hawkins, *supra* note 11 (noting the Danish Foreign Ministry’s opinion that they could not try the pirates domestically).

43. *Id.*

44. Kontorovich, *supra* note 13.

45. Rothwell, *supra* note 16.

46. Kontorovich, *supra* note 15.

47. *See* Hawkins, *supra* note 11 (noting agreements entered into the United States, the European Union, and Kenya, for Kenya to accept pirates for prosecution).

48. *See id.* (questioning how long Kenya will continue to accept jurisdiction).

49. Kontorovich, *supra* note 14; *see* UNCLOS, *supra* note 18, art. 105 (providing that “every State may seize a pirate ship” on the high seas, but that prosecution of

that this provision was intended to preclude transfers to third states.<sup>50</sup> In an effort to deal with piracy off the coast of Somalia, Resolution 1851 authorizes “shiprider” agreements to facilitate more effective law enforcement capability.<sup>51</sup> The Resolution states that the purpose of these agreements is to “facilitate the investigation and prosecution of persons detained as a result of operations conducted under this Resolution for acts of piracy and armed robbery at sea off the coast of Somalia.”<sup>52</sup> The resolution also addresses several issues related to piracy prosecution, stating that agreements may be made,

provided that the advance consent of the [Transitional Federal Government] is obtained for the exercise of third state jurisdiction by shipriders in Somali territorial waters and that such agreements or arrangements do not prejudice the effective implementation of the [1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation] Convention.<sup>53</sup>

U.N. Member States are bound to carry out the decisions of the U.N. Security Council,<sup>54</sup> a body that has power to modify obligations under the UNCLOS.<sup>55</sup> Pursuant to the foregoing Security Council resolution, the European Union signed an agreement with Kenya for Nairobi to prosecute suspected pirates captured by E.U. vessels.<sup>56</sup> The adjudicatory effectiveness of an arrangement such as this, however, can hinge on economic, judicial, legal, and even political factors. The legal systems of some countries only provide for personal or

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suspected pirates should be conducted by the “courts of the State which carried out the seizure”).

50. See REPORT OF THE INTERNATIONAL LAW COMMISSION TO THE GENERAL ASSEMBLY, U.N. GAOR, 11th Sess., Supp. No. 9 at 29, U.N. Doc. A/3150 (Apr. 23–July 4, 1956) [hereinafter ILC REPORT 1956] (“This article gives any State the right to seize pirate ships . . . and to have them adjudicated upon by its courts. This right cannot be exercised at a place under the jurisdiction of another State.”).

51. S.C. Res. 1851, *supra* note 1, ¶ 5.

52. *Id.* ¶ 3.

53. *Id.*

54. U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

55. See *id.* art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).

56. Katharine Houreld, *Piracy Suspects Appear in Kenya Courts*, BOSTON GLOBE, Apr. 24, 2009, at A7. Currently, Kenyan Courts are prosecuting suspected pirates sent to them by Germany, Britain and France. *Id.* Western nations are often reluctant to try Somali suspects who might try to claim asylum. See Ungeod-Thomas & Woolf, *supra* note 8 (suggesting that the Royal Navy releases pirates to avoid asylum claims that might arise if the pirates are prosecuted in Europe).

national criminal jurisdiction.<sup>57</sup> Thus, a country's ability to prosecute arrested pirates depends on its own laws. This was the problem that the Danish Navy faced when it captured the flagship *Absalon* and detained ten suspected armed pirates in the seas off Somalia after they had allegedly attacked merchant ships that were not Danish.<sup>58</sup> The Danish authorities had nowhere to take them because Denmark could only exercise national criminal jurisdiction if the pirates had attacked a Danish ship or Danish citizens; thus, Denmark was barred from prosecuting.<sup>59</sup> Instead, Denmark looked to other states to conduct the prosecution, but more complications arose, such as insufficient evidence for those states to convict.<sup>60</sup> As a result, Denmark had no choice but to release the pirates off the shore of Somalia.<sup>61</sup>

Kenya and Puntland have recently been designated as the prime destinations for piracy prosecution.<sup>62</sup> But there are doubts that Kenya can handle the costly and complicated task of trying cases that emerge from the exploding piracy crisis, because the country continues to struggle with its own backlog of criminal and civil cases.<sup>63</sup> Other nations have even handed over captured pirates to the internationally unrecognized breakaway state of Puntland, located in North Eastern Somalia, for prosecution.<sup>64</sup> Most of the pirates sent to Puntland came from Puntland, and it is unclear how long the pirates would actually stay in prison if they were convicted and sentenced in that state.<sup>65</sup> According to experts, a pirate's stay in a Puntland prison is often brief because criminals there are able to either walk out or bribe officials for their release.<sup>66</sup> Nonetheless, forty-five of the fifty-

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57. See Rothwell, *supra* note 16 (explaining that international piracy law does not usually extend to offshore attacks).

58. Hawkins, *supra* note 11.

59. *Id.*

60. *Id.*

61. *Id.*

62. See *id.* (reporting Kenya's agreement with the United States and the European Union to try pirates in its courts).

63. See *id.* (reiterating sentiments that the Kenyan justice system is corrupt and unfair).

64. *Id.* Somalia is currently split into several parts. Reynolds, *supra* note 25. The capital, Mogadishu, is nominally under the control of a transitional government. *Id.* The breakaway Islamist group al-Shabab controls most of the south and central areas of the country. *Id.* The pirates, however, are based further north in Puntland, a semi-autonomous region, with the main pirate base in the port of Eyl. *Id.* Somaliland is around the coast, and is currently seeking independence. *Id.* In light of these developments, the chances that the world will soon see a peaceful and united Somalia are stark.

65. Hawkins, *supra* note 11.

66. *Id.*; see also Reynolds, *supra* note 25 ("There is a president [of Puntland] but he has either no power or no interest in stopping a lucrative form of income. It is

seven pirates caught by the French Navy during recent operations have been transferred to Puntland authorities.<sup>67</sup> The U.S. Navy also sent nine pirates to Puntland, which means that Puntland accounted for nearly half of the pirates reported to be facing prosecution in the region.<sup>68</sup>

### B. *Jurisdictional Constraints*

Amidst the transfer of pirates to third countries, jurisdictional questions have inevitably surfaced. For example, in *Hassan M. Ahmed v. Republic of Kenya*,<sup>69</sup> the suspected pirates attacked an Indian merchant ship 275–280 miles off the Somali coast in January, 2006.<sup>70</sup> After the U.S. Navy captured the suspects aboard an Indian dhow, they transferred them to Kenyan authorities for prosecution.<sup>71</sup> At the time, the U.N. Security Council had not yet passed the resolution that would authorize the lawful extradition of piracy suspects to third countries for prosecution.<sup>72</sup> Still, the court invoked the UNCLOS and universal jurisdiction under customary international law as the basis for its jurisdiction.<sup>73</sup> The defense argued that the Kenyan court had no jurisdiction to hear the matter because the suspects were arrested in Somalia's 200-nautical-mile territorial sea, and submitted that the proper venue for the trial would be Somalia or India.<sup>74</sup> The basis of this contention was that none of the parties involved were Kenyan, thus ruling out personal jurisdiction, and that the offense was committed miles away from the Kenyan coast, thus ruling out territorial jurisdiction.<sup>75</sup> The Kenyan court considered these arguments, but ultimately rejected the defense's appeal.<sup>76</sup> With the requisite legislation, Kenyan courts could prosecute piracy through the principle of universal jurisdiction, which would grant them

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believed that the money gained from ransom is more than the income of the local government of Puntland.”).

67. Hawkins, *supra* note 11.

68. *Id.*

69. (2009) eKLR (H.C.K.) (Kenya).

70. *Id.* at 1–2.

71. *Id.* at 3.

72. Resolution 1851 was passed in December, 2008. S.C. Res. 1851, *supra* note 1.

73. *Ahmed*, eKLR at 7.

74. *Piracy Suspects Challenge Court*, NEWS24.COM, Feb. 6, 2006, [http://www.news24.com/Content/Africa/News/965/5db1f9fef91244e8aa62aa5cc95bdd0e/06-02-2006-03-04/Piracy\\_suspects\\_challenge\\_court](http://www.news24.com/Content/Africa/News/965/5db1f9fef91244e8aa62aa5cc95bdd0e/06-02-2006-03-04/Piracy_suspects_challenge_court).

75. *Ahmed*, eKLR at 5.

76. *Id.* at 7.

competence to try pirates even if the pirates were captured by another state.<sup>77</sup>

However, a close reading of the UNCLOS indicates that customary international law does not establish universal jurisdiction in cases of extradition, and that such jurisdiction would be contrary to the terms of the treaty which provide that the capturing country should carry out the prosecution.<sup>78</sup> Indeed, some countries might even be in breach of their international obligations if they extradite suspected pirates to other countries if it is likely that the receiving country will violate the pirate's human rights.<sup>79</sup> The commentary for Article 43 of the UNCLOS provides that the article gives "any State the right to seize pirate ships (and ships seized by pirates) and to have them adjudicated upon by its courts," but this right is not transferrable to another state.<sup>80</sup> This provision articulates universal jurisdiction insofar as it permits any state that seizes pirates on the high seas to subject the pirates to prosecution in a state's domestic courts.<sup>81</sup> The provision does not, however, permit that state to try pirates if it captures them in the territorial waters of another state.<sup>82</sup> Piracy, as defined in the UNCLOS, must occur on the high seas, outside the jurisdiction of any single state.<sup>83</sup> Thus, unless a state's legislation explicitly provides for piracy as such, it will not be punishable under its domestic law.<sup>84</sup>

### C. *Contending with Unreliable Courts*

The use of third countries in the prosecution of suspected pirates raises both due process and long-term sustainability concerns

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77. See generally Kontorovich, *supra* note 13 (explaining that the legal concept of universal jurisdiction allows any nation to prosecute pirates).

78. See UNCLOS, *supra* note 18, art. 105 ("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 or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith." (emphasis added)).

79. See, e.g., *Soering v. United Kingdom*, 161 Eur. Ct. H.R. 8 (ser. A) (1989). *Soering* resisted extradition to the United States—which permits the imposition of the death penalty and the "death row phenomenon"—on the ground that the United Kingdom would be violating its obligations under the European Convention on Human Rights regarding the prohibition of inhumane or degrading treatment. *Id.* at 30–31. The European Court of Human Rights agreed. *Id.* at 50.

80. ILC REPORT 1956, *supra* note 50, at 29.

81. *Id.*

82. See *id.* (requiring seizure to occur outside the jurisdiction of a state).

83. UNCLOS, *supra* note 18, art. 101.

84. Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 TUL. MAR. L.J. 257, 264 (2002).

regarding whether the process guarantees fair procedures. Can Kenyan courts, for example, act as an effective default tribunal for the prosecution of pirates, or are they being used on a merely ad hoc basis?<sup>85</sup> From a procedural standpoint, are they sufficiently equipped for the task?<sup>86</sup> Some have observed that the Kenyan courts have “scant judicial resources” and a huge “backlog of cases.”<sup>87</sup> For these reasons, and in consideration of the international ramifications at stake, piracy cases ought to be tried in courts that are sufficiently equipped to handle piracy cases.

The Kenyan judiciary itself is rife with problems, as judges operate under either a cloud of corruption or a lack of independence. For example, in 2005, the International Commission of Jurists reported that in Kenya, “five out of nine Court of Appeal justices, 18 out of 36 High Court justices and 82 out of 254 magistrates were implicated as corrupt,” and noted that judicial corruption has severely impeded development of the rule of law in Kenya.<sup>88</sup> Corruption in the Kenyan judiciary is persistent, endemic, and quite intractable.<sup>89</sup> During a visit to Kenya in August, 2009, the U.S. Secretary of State, Hillary Rodham Clinton, acknowledged the shortcomings in Kenya’s judiciary by using a phrase commonly heard in Kenya: “Why hire a lawyer when you can buy a judge.”<sup>90</sup> If the national courts of countries that capture suspected pirates will not prosecute them, and if outsourcing that responsibility to third countries is problematic, then the responsibility of resolving piracy is left to the international community, and its use of international law, to try to resolve the issue. First among the efforts of the international community must be an examination of the adequacy of the existing legal framework.

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85. See Robert Marquand, *Sticky Legal Battles Await for Captured Somali Pirates*, CHRISTIAN SCI. MONITOR, Apr. 14, 2009, at 5–6 (noting that “Mombasa [was] acting as a kind of Hague international tribunal for pirate crime”).

86. See Bahar, *supra* note 2, at 81 (explaining that in many Kenyan courts, magistrates must transcribe the testimony of witnesses by hand and prosecutors tend to lack the requisite time and resources to effectively prosecute cases).

87. *Id.*

88. INT’L COMM’N OF JURISTS, KENYA: JUDICIAL INDEPENDENCE, CORRUPTION AND REFORM 3–4 (2005).

89. See *id.* at 3 (raising the concern that although many of the judges who were implicated as corrupt had resigned, those taking over the vacated positions may have been selected based on political, tribal, or sectarian connections).

90. Clinton in Kenya Urges a Cleanup of Corruption, CNN.COM, Aug. 6, 2009, <http://edition.cnn.com/2009/POLITICS/08/06/clinton.kenya/index.html>.

## II. LAW OF THE SEA AND PIRACY: ISSUES OF DEFINITION AND JURISDICTION

Some enforcement constraints arise in connection with the scope of the substantive provisions of the UNCLOS itself. If international law regarding piracy is inadequate, one of the primary protective safeguards against piratical acts would be severely limited with respect to both the scope of protection as well as the extent to which jurisdiction can be exercised.<sup>91</sup> If an act of piracy does not fall within the ambit of the UNCLOS, an institution or state that prosecutes pirates at the international level would not have jurisdiction unless the Convention's provisions also conferred on it sufficient subject matter jurisdiction.<sup>92</sup> These issues call for an analysis of not only the sufficiency and efficacy of existing enforcement institutional mechanisms from a procedural standpoint, but also an analysis of the adequacy of the substantive laws that are used to combat piracy. Several commentators have undertaken studies on the normative adequacy of piracy provisions under the UNCLOS.<sup>93</sup> Even the United Nations has recently recognized similar inadequacies, and to that end, has sought to supplement the UNCLOS by passing a number of legally binding resolutions.<sup>94</sup>

### A. *Defining Piracy*

To begin, when confronted with an act of violence at sea, a state must ask: Where did the act take place? Questions of jurisdiction will be resolved once it is determined whether the act took place in parts of the sea under the sovereignty of the coastal state,<sup>95</sup> or instead, in

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91. See Samuel Pyeatt Menefee, *The New "Jamaica Discipline": Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 CONN. J. INT'L L. 127, 146 (1990) (estimating that "less than one in five recent incidents of maritime violence would qualify as high seas piracy under [UNCLOS]," and arguing that UNCLOS reduces the basis for international jurisdiction over piratical crimes).

92. See Rothwell, *supra* note 16 (explaining that modern international law on piracy does not cover attacks occurring within the territorial sea of a coastal state, thereby typically rendering the international community powerless to prosecute).

93. See, e.g., Menefee, *supra* note 91, at 141–48 (detailing alleged defects in UNCLOS, including the lack of clarity over what constitutes an illegal act and the requirement that a piratical act be committed for a private end).

94. See *infra* Part III (discussing how the United Nations has adopted resolutions conferring maritime powers not granted in UNCLOS to member states in order to allow them to conduct antipiracy operations in Somali waters and to facilitate the prosecution of suspected pirates).

95. Under UNCLOS, areas under the sovereignty of the coastal state include: Internal Waters and Ports (Arts. 8 and 11); Territorial Sea (Art. 2); and Archipelagic Waters (Art. 49), including onboard vessels of the flag state (Art. 92). UNCLOS, *supra* note 18. Under Article 105 of UNCLOS, any state can arrest and prosecute acts

international waters.<sup>96</sup> If taking place in an area under the sovereignty of a coastal state, the act would likely be a criminal offense under the laws of the coastal state.<sup>97</sup> The UNCLOS enumerates specific acts that constitute piracy.<sup>98</sup> The UNCLOS definition of piracy, adopted from the definition provided in the 1958 Geneva Convention on the High Seas,<sup>99</sup> provides:

Piracy consists of any of the following acts: (a) any *illegal* acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the *high seas*, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property *in a place outside the jurisdiction of any State*; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).<sup>100</sup>

Some contemporary commentators understand this definition to be a codification of the customary international law on piracy.<sup>101</sup> If it

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of piracy even if such acts are committed in international waters, regardless of whether the vessels were carrying the state's flag or not.

96. Under UNCLOS, areas under international waters include: High Seas (Art. 86) and Exclusive Economic Zones (Art. 58(2)). *Id.*

97. Rothwell, *supra* note 16.

98. UNCLOS, *supra* note 18, art. 101.

99. United Nations Convention on the High Seas, arts. 15–18, April 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11.

100. UNCLOS, *supra* note 18, art. 101 (emphasis added).

101. See, e.g., Erik Barrios, Note, *Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia*, 28 B. C. INT'L & COMP. L. REV. 149, 153 (2005) (explaining that if UNCLOS is treated as a codification of customary international law on piracy, all states, whether they are signatories or not, would be bound by the UNCLOS definition). Other commentators, however, argue either that there is "no custom regarding a modern definition of piracy" or that the UNCLOS definition is only a partial codification of the customary law on piracy. John E. Noyes, *Introduction to the International Law of Piracy*, 21 CAL. W. INT'L L.J. 105, 109 (1990) (quoting Barry Hart Dubner, *Piracy in Contemporary National and International Law*, 21 CAL. W. INT'L L.J. 139, 143 (1990)). If one considers customary international law to be broader than UNCLOS, then, some argue, customary international law may be applicable to incidents involving insurgents or terrorists not otherwise part of the UNCLOS definition. *Id.* The two regimes of international law can exist separately. In *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), the International Court of Justice held that customary international law concerning the right of a state to use force against another state exists separately from such rules as those contained in the U.N. Charter, even where the two categories of law are largely identical. *Military*, 1986 I.C.J. ¶¶ 172–82. This holding highlights the indefinite meaning of piracy in customary international law, which seems so amorphous that different commentators reach different conclusions as to "the outer limits of a rule of customary international law proscribing piracy." Noyes, *supra* note 101, at 110. Professor Rubin, in his comprehensive study of piracy since Greek and Roman times, argues that the concept of piracy reveals no consistent practice. ALFRED P. RUBIN,

is, then even states that are not parties to the UNCLOS may be bound, under appropriate conditions, by the same definition.<sup>102</sup> But does this mean that the definition is sufficient to meet contemporary challenges?

The “core meaning” of this definition is that piracy involves “individuals on one private ship [attacking] another ship on the high seas, solely for private, commercial gain.”<sup>103</sup> In a world where non-state organizations that commit piratical acts are becoming increasingly assertive, as evidenced by the increase in pirate attacks occurring in the Gulf of Aden and in the waters off the coasts of Somalia and West Africa,<sup>104</sup> several contemporary commentators resist a definition of piracy that does not include reference to terrorist or political activity.<sup>105</sup> It would be self-defeating, they argue, to restrict the definition of piracy to commercially motivated acts when acts meant to promote terror or political objectives can pose a similar threat to safety at sea.<sup>106</sup> The increase in political motives inextricably linked to illegal activities at sea demonstrates that a distinction between motives is no longer sustainable in a world where non-state actors are either as powerful or more powerful than some states. In the Niger Delta, for instance, the rebels justify their recourse to piracy by citing political objectives.<sup>107</sup> Similarly, pirates in Somalia have used their ransom money to advance their own extremist political objectives. Recent United Nations reports indicate that

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THE LAW OF PIRACY 1–2 (2d ed. 1988). A rule of customary international law requires fairly consistent state practice with a sense of legal authority or *opinio juris vel necessitatis*. Noyes, *supra* note 101, at 109–10.

102. See Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM J. INT’L L. 269, 272 n.12 (1988) (explaining that customary international law recognizes absolute universal jurisdiction over the crime of piracy and, as a result, the location where the piratical act is committed is largely irrelevant).

103. See Noyes, *supra* note 101, at 109.

104. See Int’l Maritime Org., *Piracy in the Waters off the Coast of Somalia*, [http://www.imo.org/Facilitation/mainframe.asp?topic\\_id=1178](http://www.imo.org/Facilitation/mainframe.asp?topic_id=1178) (last visited June 3, 2010) (reporting that the frequency of piratical attacks in East Africa has risen astronomically, with new incidents reported almost daily in 2008).

105. See, e.g., Garmon, *supra* note 84, at 275 (advancing the position that in order to effectively combat terrorism, it is necessary to include in the UNCLOS definition of piracy piratical acts motivated by political objectives).

106. See Halberstam, *supra* note 102, at 289 (observing the similarities between terrorists and pirates include that (1) they both threaten all states by attacking many states indiscriminately and (2) generally no one state can be held responsible for their acts).

107. See Ukoha Ukiwo, *From “Pirates” to “Militants”: A Historical Perspective on Anti-state and Anti-oil Company Mobilization Among the Ijaw of Warri, Western Niger Delta*, 106 AFR. AFF. 587, 603 (2007) (explaining that “violent mobilization was justified on the grounds that previous appeals for understanding had failed to yield the desired objectives of self-determination”).

“[t]here are increasing reports of complicity by members of the Somali region of ‘Puntland’ administration in piracy activities” and that “[i]t is widely acknowledged that some of these [piracy] groups now rival established Somali authorities in terms of their military capabilities and resource bases.”<sup>108</sup> Some legal scholars argue that the “private ends” criterion should include acts committed by groups or persons, such as rebel groups, “that rob or arrest a [vessel] for a ransom as a fundraiser scheme to fund their political activities.”<sup>109</sup> Yet other scholars find support in customary international law that the prohibition against piracy also covers political acts.<sup>110</sup> In support of this contention, some scholars cite domestic case law.<sup>111</sup> However, it is unlikely that such domestic cases will override the clear letter of the UNCLOS.<sup>112</sup>

### B. *Terrorist and Political Acts in the Context of Piracy*

Terrorist concerns have not escaped the attention of commentators.<sup>113</sup> If there are state-sponsors of terrorism,<sup>114</sup> why would

108. Secretary-General, *Report of the Secretary-General Pursuant to Security Council Resolution 1846 (2008)*, ¶¶ 5, 7, delivered to the Security Council and the General Assembly, U.N. Doc. S/2009/146 (Mar. 16, 2009).

109. See, e.g., H.E. José Luis Jesus, *Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT’L J. MARINE & COASTAL L. 363, 379 (2003) (arguing that “grey areas . . . make it difficult to distinguish an act for ‘private ends’ from an act in pursuit of a politically-motivated one”).

110. See, e.g., Halberstam, *supra* note 102, at 289 (stating that although customary international law does not have a clear definition of piracy, terrorist acts would most likely be considered piracy under customary international law).

111. See, e.g., John Kavanagh, *The Law of Contemporary Sea Piracy*, 1999 AUSTR. INT’L L.J. 127, 139–40 (looking to Australian case law to determine “who is a pirate”). The Australian case *R. v. Walton*, (1827) N.S.W.S. Ct. Cas. 7 (Austral.), available at <http://www.austlii.edu.au/au/special/NSWSupC/1827/7.html>, is instructive on this point. In *Walton*, sixty-six convicts seized control of a vessel but were careful not to harm the seamen who became their captives. *Id.* The convicts expressed their intention to return the brig and its cargo once they achieved their liberty. *Id.* When they were captured, the convicts were nevertheless convicted of the offense of piracy. That is why Viscount Sankey said in *In re Piracy Jure Gentium*, (1934) A.C. 586 (U.K.), that “[w]hen it is sought to be contended, as it was in this case, that armed men sailing the seas on board a vessel . . . could attack and kill everybody on board another vessel . . . without committing the crime of piracy unless they stole [something.] . . . their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law.” *Id.* at 594.

112. See Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331, 339 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”).

113. See Jesus, *supra* note 109, at 363 (noting “a spiraling increase of piratical and terrorist attacks against shipping and persons on board,” in addition to “unprecedented maritime insecurity in modern times”).

114. For example, in response to the attacks on the World Trade Center in New York on September 11, 2001, the U.N. Security Council passed Resolution 1373 recognizing that the attacks had taken place with governmental support. S.C. Res. 1373, ¶ 5, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

it be impossible to have state sponsors of piracy?<sup>115</sup> Current trends indicate that piracy has turned increasingly violent and deadly.<sup>116</sup> The IMB reports, for instance, that “[i]n the first six months of 2008 . . . 11 vessels were fired upon . . . [a] total of 190 crew members were taken hostage, six kidnapped, seven killed and another seven are missing, presumed dead.”<sup>117</sup> Additionally, reports of the IMO indicate that, in many cases, pirates have taken hostage the crew of captured ships and have even threatened to kill members of the crew, depending on their nationality.<sup>118</sup>

Recently, snipers from the U.S. military “fatally shot three pirates holding an American cargo-ship captain hostage after seeing that one of the pirates ‘[was leveling] an AK-47 at the captain’s back.’”<sup>119</sup> The pirates threatened to avenge their comrades’ deaths by killing U.S. sailors they would take hostage in the future.<sup>120</sup> Obviously, in such a situation the pirates’ motives go beyond financial objectives, but to deny that they are pirates because of their political, as opposed to financial, objective seems absurd. Nevertheless, shortly after publicizing their threat, the Somali pirates carried it out by attacking an American freighter with rockets.<sup>121</sup> One of the pirate commanders, Abdi Garad, was reported to have said: “We intended to destroy this American flagged ship and the crew on board but unfortunately they narrowly escaped us.”<sup>122</sup> In another case, members of the Palestinian Liberation Front (PLF) disguised themselves as tourists in order to board the M/S *Achille Lauro*, whereupon the group “threatened to blow up the cruise ship if Israel did not release

115. See Clyde H. Crockett, *Toward a Revision of the International Law of Piracy*, 26 DEPAUL L. REV. 78, 90 (1976) (arguing that it would be “unwise to foreclose forever the possibility that a State, or those acting in behalf of a State, may come within the ambit of piracy”).

116. For example, on May 31, 2009, the M/V *Stolt Strength* sustained damage from the automatic gun and rocket propelled grenade fire of pirates. INT’L MARITIME ORG., REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS: ACTS REPORTED DURING MAY 2009 (MSC.4/Circ.137) 5 (June 17, 2009).

117. ICC Commercial Crime Services, International Chamber of Commerce, *IMB Piracy Report Highlights Trouble in African Waters*, July 10, 2008, [http://www.icc-ccs.org/index.php?option=com\\_content&view=article&id=157:imb-piracy-report-highlights-trouble-in-african-waters&catid=60:news&Itemid=51](http://www.icc-ccs.org/index.php?option=com_content&view=article&id=157:imb-piracy-report-highlights-trouble-in-african-waters&catid=60:news&Itemid=51).

118. See, e.g., INT’L MARITIME ORG., REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS: ACTS REPORTED DURING DECEMBER 2009 (MSC.4/Circ.147) Annex 1 at 1–2 (Jan. 5, 2009) (reporting that in December alone, at least fifty-seven people were taken hostage).

119. *Hostage Captain Rescued; Navy Snipers Kill 3 Pirates*, CNN.COM, Apr. 12, 2009, <http://www.cnn.com/2009/WORLD/africa/04/12/somalia.pirates/>.

120. *Pirates Vow to Kill U.S., French Sailors*, CNN.COM, Apr. 13, 2009, <http://www.cnn.com/2009/WORLD/africa/04/13/somalia.pirates.revenge>.

121. Mustafa Haji Abdinur, *Pirates Take Revenge on U.S. Ship*, NATIONAL POST, Apr. 15, 2009, available at <http://www.nationalpost.com/news/story.html?id=1498592>.

122. *Id.*

fifty Palestinian prisoners.”<sup>123</sup> Some argue that because of the PLF’s political motivations fueled this attack, the group should not be considered pirates.<sup>124</sup> In a complex world where material gains are often intermingled with political objectives, such hairsplitting distinctions may only deprive the international community of an important tool in the suppression of piracy. Justice Story of the U.S. Supreme Court made a great insight when, many years ago, he noted:

A pirate is deemed, and properly deemed, *hostis humani generis*. . . . If he willfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the act of Congress, as if he did it solely and exclusively for the sake of plunder, *lucri causa*[.] The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically *hostis humani generis*.<sup>125</sup>

The International Law Commission (ILC) appears to support the foregoing proposition. The ILC cited Mr. Matsuda, Rapporteur of the Sub-Committee on the League of Nations Committee of Experts for the Progressive Codification of International Law, who said that “[i]t is better, in laying down a general principle, to be content with the external character of the facts without entering too far into the often delicate question of motives.”<sup>126</sup> The ILC also cited L. Oppenheim who expressed a similar view:

In the regular case of piracy the pirate wants to make booty . . . . But he remains a pirate, whether he does so or whether he kills the crew and appropriates the ship, or sinks her. . . . [T]he cargo need not be the object of his act of violence. . . . [I]t is likewise piracy if he stops a vessel merely to kill a certain person on board, although he may afterwards free vessel, crew, and cargo.<sup>127</sup>

The ILC followed the Harvard Research Draft of the Harvard Research Center,<sup>128</sup> which had observed: “The draft convention

123. See Bahar, *supra* note 2, at 27.

124. See *id.* at 27 n.114 (elaborating that although it is not clear whether the initial seizure took place in Egyptian territory or on the high seas, it is clear that the hostage phase occurred on the high seas).

125. *Harmony v. United States*, 43 U.S. (2 How.) 210, 232 (1844).

126. *Summary Records of the 290th Meeting*, [1955] 1 Y.B. Int’l Law Comm’n, 40 U.N. Doc. A/CN.4/SR.290 (internal citations omitted).

127. *Id.*

128. In 1932, the Harvard Research in International Law Group created the Draft Convention on Piracy. See *Piracy*, 26 AM. J. INT’L L. SUPP. 739 (1932). Article 7(1) of this Draft Convention permitted “hot pursuit,” which allowed a state to pursue a pirate vessel into the territorial seas of a foreign state if the pursuit began in its own territorial waters or on the high seas. *Id.* at 744. Some countries followed this

excludes from its definition of piracy all cases of wrongful attacks on persons or property for political end . . . . [T]here seems no good reason why jurisdiction over genuine cases of this type should not be confined to the injured State.”<sup>129</sup> It is also important to note that drafters of the UNCLOS explicitly failed to delete *animus furandi* from their definition of piracy, because piracy “may be prompted by feelings of hatred or revenge, and not merely by the desire for gain.”<sup>130</sup>

### C. Territorial Jurisdiction and State Sovereignty

For the purposes of territorial jurisdiction, the definition of piracy restricts acts of piracy to those committed on the high seas.<sup>131</sup> But often times, pirates target ships in territorial waters that are home to some of the most popular commercial shipping lanes.<sup>132</sup> In fact, most incidents of attacks on commercial vessels have occurred in territorial waters<sup>133</sup> within the jurisdiction of a coastal state.<sup>134</sup> The 2008 annual report of the IMO indicates that “[m]ost of the attacks worldwide were reported to have occurred or to have been attempted in the coastal States’ concerned territorial waters while the ships were at anchor or berthed.”<sup>135</sup> The IMO has made the same observation in

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Convention until the United Nations adopted the 1958 Convention on the High Seas, and UNCLOS. But under UNCLOS, a state may engage in hot pursuit only when the pirate ship is within the territorial sea of the pursuing state. UNCLOS, *supra* note 18, art. 111, ¶¶ 1–3. The right of hot pursuit terminates as soon as the suspected pirate vessel enters the territorial waters of another state. *Id.*; see also Ethan C. Stiles, Note, *Reforming Current International Law to Combat Modern Sea Piracy*, 27 SUFFOLK TRANSNAT’L L. REV. 299, 305–10 (2004) (arguing that the change from the Harvard Convention to UNCLOS resulted from concern for a state’s sovereign right to control its territorial water).

129. *Summary Records*, *supra* note 126.

130. ILC REPORT 1956, *supra* note 50.

131. UNCLOS, *supra* note 18, art. 101.

132. See Matthew C. Houghton, Comment, *Walking the Plank: How United Nations Security Council Resolution 1816, While Progressive, Fails to Provide a Comprehensive Solution to Somali Piracy*, 16 TULSA J. COMP. & INT’L L. 253, 255 (2009) (noting that “Somali pirates target shipping lanes that feed the Suez Canal and the Gulf of Aden”).

133. Barry Hart Dubner, *Human Rights and Environmental Disaster—Two Problems that Defy the “Norms” of the International Law of Sea Piracy*, 23 SYRACUSE J. INT’L L. & COM. 7, 34 (1997); see also Jesus, *supra* note 109, at 383 (noting that, as reported by the IMB and IMO, “two-thirds [of piracy incidents] consistently take place inside coastal states’ territorial waters”).

134. UNCLOS, *supra* note 18, arts. 8, 2, 49; see Jesus, *supra* note 109, at 380 (advancing the position that the inapplicability of international piracy rules to territorial waters is a major shortcoming of the current legal regime).

135. INT’L MARITIME ORG., REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT—2008 (MSC.4/Circ.133) ¶ 5 (Mar. 19, 2009) [hereinafter IMO ANNUAL REPORT 2008].

each of the previous three years.<sup>136</sup> Even still, it is unlikely that all of the affected countries would allow the navies of other nations to operate in their territorial waters.<sup>137</sup> As long as international rules regarding piracy do not apply to territorial waters, responsibility to combat acts that would otherwise qualify as piracy belongs solely to the coastal state, even when such a state is unwilling or unable, for political, financial, or other reasons, to suppress robbery against vessels in its own sovereign waters.<sup>138</sup>

By confining the scope of the definition of piracy to acts committed in specific geographic areas, the UNCLOS assumes the existence of a coastal sovereign state that is functional and capable of defending the territorial waters off its coast. Somalia refutes this assumption in the extreme, as contemporary piracy is rampant there due to dysfunctional and failed government, a paucity of laws regulating piracy, and an inadequate system for legal enforcement.<sup>139</sup> These issues were exemplified in June, 2007, when pirates hijacked a Danish cargo ship, the M/V *Danica White*, off the Somali coast.<sup>140</sup> In response, an American warship pursued the pirates, but called the chase off once the pirates reached the territorial waters of Somalia.<sup>141</sup> Because its only role was that of the pursuing state, the United States had no power under international law to prosecute any of the suspected pirates.<sup>142</sup> The incongruity here is apparent as an act may constitute piracy if it is committed on the high seas but will not be covered by international rules concerning piracy if it is committed in

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136. IMO ANNUAL REPORT 2007, *supra* note 30, ¶ 5; IMO ANNUAL REPORT 2006, *supra* note 5, ¶ 5; IMO ANNUAL REPORT 2005, *supra* note 5, ¶ 5.

137. See Ctr. for Int'l Law, N.Y. Law Sch., *Avast! International Law and Piracy on the High Seas*, INT'L REV., Fall 2008, at 5. (observing that countries such as Indonesia have limited the scope of Resolution 1816 so that it applies only to the unique situation in Somalia).

138. Scholars have commented that the insistence on state sovereignty in territorial waters is probably an obsolete notion due to today's technology. See, e.g., Dubner, *supra* note 133, at 40 ("The three-mile cannon shot rule, the creation of the exclusive economic zone, and the end of the cold war . . . have made the need for a belt of territorial waters measured twelve miles from the baseline obsolete.")

139. See *Avast!*, *supra* note 137, at 4–5 (observing that Somalia's government is far from recovered from a protracted civil war, which has allowed piracy to flourish).

140. *Id.* at 4.

141. See *id.* In 1991, a similar scenario unfolded with regard to the M/V *Erria Inge*, an Australian-owned and Cyprus-registered ship. After commandeering the ship from the port of Bombay, pirates later sold it for scrap in China. Kavanagh, *supra* note 111, at 139. Although the evidence overwhelmingly suggested that the theft, control, and ultimate sale of the vessel was organized from Singapore, under international law regarding piracy, the Singaporean government did not have jurisdiction to prosecute the pirates. *Id.* This was because the piratical acts originally occurred in the territorial waters of another coastal state and piracy under the UNCLOS covers only acts on the high seas. *Id.*

142. See UNCLOS, *supra* note 18, art. 111.

the internal or territorial waters of a coastal state. Indeed, this is still the case even when the act is not considered piracy under a coastal state's domestic laws.<sup>143</sup> In such circumstances, the offended state has no jurisdiction to exercise power over the suspects unless the laws of the coastal state expressly authorize such jurisdiction.<sup>144</sup> Unfortunately, the "extradite or prosecute" clause of the 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) does not apply to piracy.<sup>145</sup>

#### D. *Hot Pursuit in Territorial Waters*

In less extreme cases, states have varying levels of competence with regard to the extent to which they control their territory and territorial sea. The right of hot pursuit is especially relevant here. The notion of hot pursuit, however, also does not provide a sufficient solution. Hot pursuit is exclusively a coastal state right.<sup>146</sup> According to Article 27 (1)(b) of the UNCLOS, a coastal state may exercise criminal jurisdiction over the crew of a foreign vessel (that is, flying the flag of another state) "if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea"<sup>147</sup>—that is, if the effects of criminal activity extend to the coastal state. Under Article 27(5) of the UNCLOS:

[T]he coastal state may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.<sup>148</sup>

Thus, even if acts that qualify as piratical were committed in that portion of the sea, the coastal state may not exercise jurisdiction.

Moreover, Article 111 of the UNCLOS specifically relates to a coastal state's right of hot pursuit, providing:

143. See Rothwell, *supra* note 16 (explaining that, in the case of Somalia, the government lacked the ability to effectively enforce piracy laws in its own waters).

144. See *id.* (arguing that "the current legal regime is not comprehensive with respect to the enforcement of either international law or domestic criminal law against those responsible for pirate attacks").

145. Unless the states in question are both parties to SUA, the acts in question fall within the definition of unlawful acts of Article 3, or the states are parties to a bilateral extradition treaty. Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, art. 3, Mar. 10, 1988, 1678 U.N.T.S. 221, 224–25 (1988) [hereinafter SUA].

146. Samuel Pyeatt Menefee, *Foreign Naval Intervention in Cases of Piracy: Problems and Strategies*, 14 INT'L J. MARINE & COASTAL L. 353, 360 (1999).

147. UNCLOS, *supra* note 18, art. 27, ¶ 1.

148. *Id.* art. 27, ¶ 5.

[H]ot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted.<sup>149</sup>

The ILC recognizes that the right of hot pursuit derives from the regulations adopted by the Second Committee of The Hague Conference, but that it differs from the 1930 regulations in some respects.<sup>150</sup> This means, for example, that if pursuit of suspected pirates begins in the territorial waters of Kenya or Yemen, it must be terminated as soon as the pursuit enters the territorial waters of Somalia, unless Somali authorities grant the pursuers explicit permission to continue the pursuit.

As incidents of piracy have proliferated, so has the deployment of navies to counter piracy. But this response has its limitations. Article 107 of the UNCLOS provides that only warships, military aircraft, or other ships or aircraft clearly marked and identifiable as representing government services authorized by the government may carry out a seizure on account of piracy.<sup>151</sup> This seems to indicate that seizures by private ships would not be authorized under the purview of this provision. In light of contemporary challenges, however, this seems to be an overly constraining provision. In the wake of the American M/V *Maersk Alabama* incident, there was praise for the way the crew had acted in self-defense, and it was hoped that future crews would be equipped to respond not just to executed attacks, but also to suspected attacks in order to contain the problem of piracy.<sup>152</sup> Yet, even an act in self-defense seems to fall outside the scope of this provision.<sup>153</sup> The deficiencies of this provision illustrate an overly state-centric conception. The commentary of the ILC on Article 45 of the Convention on the High Seas, a provision similar to Article 107

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149. *Id.* art. 111, ¶ 1.

150. See ILC REPORT 1956, *supra* note 50, at 285 (stating that the commission's rules only differ from those of The Hague Conference in defining zones in which hot pursuit may be undertaken and whether aircraft may participate in hot pursuit).

151. UNCLOS, *supra* note 18, art. 107.

152. See *Pirates Foiled in a Second Attack on Maersk Alabama Cargo Ship*, CNN.COM, Nov. 19, 2009, <http://www.cnn.com/2009/WORLD/africa/11/18/maersk.alabama.pirates/index.html?iref=allsearch> (noting that the crew of the M/V *Maersk Alabama* later used force to repel a subsequent pirate attack).

153. See Kavanagh, *supra* note 111, at 144 (noting that the International Law Commission commentary indicates that acts of self defense by a merchant ship are not covered under Article 107).

of the UNCLOS, urges that “State action against ships suspected of engaging in piracy should be exercised with great circumspection, so as to avoid friction between States.”<sup>154</sup> Hence, it is important that the right to take action be confined to warships.<sup>155</sup> The commentary adds:

Clearly this article does not apply in the case of a merchant ship which has repulsed an attack by a pirate ship and, in exercising its right of self-defense, overpowers the pirate ship and subsequently hands it over to a warship or to the authorities of a coastal State. This is not a “seizure” within the meaning of this article.<sup>156</sup>

What happens when a suspected pirate vessel being pursued by a foreign government’s warship manages to escape into the territorial waters of a coastal state that is unwilling to continue pursuing the pirate vessel? The UNCLOS expressly provides that “[t]he right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.”<sup>157</sup> This provision defers to the sovereignty of other states, but it also assumes that the coastal state of the ship pursued or the third state is willing and able to capture and prosecute the suspected pirates. As contemporary piratical acts amply demonstrate, deference to other states’ sovereignty largely ignores the reality that some states are either unwilling or unable to prosecute suspected pirates. The UNCLOS places limitations on daring action. Under Article 110 of the UNCLOS, a warship must first send an officer-led party to board a suspected pirate ship to verify any suspicions.<sup>158</sup> The warship cannot simply open fire; rather, any inspection has to be carried out “with all possible consideration.”<sup>159</sup> The provision’s language sounds “rather tentative,” as one commentator has observed.<sup>160</sup>

The UNCLOS provides for a restrictive form of innocent passage through the territorial sea and through the straits of the coastal states. With respect to territorial sea, the treaty provides for innocent passage of warships, as long as the ship complies with state laws and regulations for passage; otherwise, it may be ordered to leave the territorial sea.<sup>161</sup> With respect to straits, the treaty requires ships, including warships, to proceed through straits without delay and to

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154. ILC REPORT 1956, *supra* note 50, at 283.

155. *Id.*

156. *Id.*

157. UNCLOS, *supra* note 18, art. 111, ¶ 3.

158. *Id.*

159. *Id.*

160. Reynolds, *supra* note 25.

161. UNCLOS, *supra* note 18, art. 30.

“refrain from any threat or use of force against the sovereignty, [or] territorial integrity . . . of the States.”<sup>162</sup> At least one commentator has argued that this means that a foreign warship has no chance of undertaking antipiracy activities in a state’s coastal waters under the UNCLOS without the permission of the coastal state, unless it wishes to risk the possibility of sanctions.<sup>163</sup> Any intervention in these areas would depend upon the existence of separate bilateral or multilateral agreements.<sup>164</sup>

All state parties to the UNCLOS have a duty to cooperate to the “fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”<sup>165</sup> Again though, this obligation ceases as soon as pirates cross into the territorial or internal waters of a coastal state. According to the commentary of the ILC on a similarly worded definition for piracy in Article 39 of the 1958 Geneva Convention on the High Seas, “where the attack takes place within the territory of a State, including its territorial sea, the general rule should be applied that it is a matter for the State affected to take the necessary measures for the repression of the acts committed within its territory.”<sup>166</sup> However, coastal states have no international obligation to enact domestic laws aimed at combating acts considered to be piracy under international law.

#### *E. Deficiencies in the Definition of Piracy*

The SUA attempts to address forms of maritime violence that are not included in the UNCLOS definition. The SUA extended the definition of piracy to include attacks within territorial waters, but it did not extend the scope of universal jurisdiction to cover such attacks.<sup>167</sup> Not only does SUA apply to offenses committed in almost all areas of the oceans, including territorial waters,<sup>168</sup> it also requires state parties to either prosecute or extradite perpetrators of maritime violence.<sup>169</sup> The SUA leaves unanswered, though, the question of what happens in situations where the coastal state is unwilling or unable to prosecute suspected pirates or extradite them to a third

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162. *Id.* art. 39, ¶ 1.

163. See Menefee, *supra* note 146, at 360 (arguing that the UNCLOS may prevent foreign ships from assisting in antipiracy efforts).

164. *Id.*

165. UNCLOS, *supra* note 18, art. 100.

166. ILC REPORT 1956, *supra* note 50, art. 39.

167. SUA, *supra* note 145, art. 4.

168. *Id.* arts. 4, 6.

169. *Id.* art. 10, ¶1.

state. Whether extradition or prosecution takes place remains a matter exclusively within the discretion of the state.<sup>170</sup> In addition, the SUA requires that perpetrators or victims be nationals of a state party to the convention.<sup>171</sup> This effectively undercuts the *jus cogens*<sup>172</sup> and *erga omnes* character of the crime of piracy, which confers universal jurisdiction to prosecute the crime. Furthermore, the obligations under the SUA attach only to states that are parties to the treaty.<sup>173</sup>

It has also been noted that the definition of piracy is a bit ambiguous to the extent that it proscribes only “illegal” acts of violence.<sup>174</sup> As John Noyes points out, this ambiguity could be interpreted to mean that some acts of violence are legal even when carried out in the same context.<sup>175</sup> The term “illegal” could, for example, contemplate the concept of “legal” violence by insurgents.

Debate continues over whether acts of violence committed within a country’s 200-mile Exclusive Economic Zone (EEZ), but beyond its territorial waters, qualify as acts of piracy since the definition only refers to acts committed on the high seas.<sup>176</sup> The concept accepted by the ILC is narrower in scope.<sup>177</sup> Under international law, piracy is limited to the high seas, which, as defined under the UNCLOS, excludes economic zones and archipelagic waters.<sup>178</sup> Yet, no country has jurisdiction over the high seas—jurisdiction which Article 86 of the UNCLOS defines as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea, or in the internal waters of a State . . . .”<sup>179</sup> Article 86 substantially reduces states’ jurisdiction over piracy, because less than one in five incidents of maritime violence qualify as high-seas piracy under the UNCLOS standards.<sup>180</sup> Although Article 58 of the UNCLOS provides that the

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170. See Garmon, *supra* note 84, at 273 (noting that while a state is obligated to either prosecute or extradite any detained suspect, there are no regulations governing when a state must take which action).

171. SUA, *supra* note 145, art. 6.

172. See Garmon, *supra* note 84, at 273 (noting that SUA essentially prevents piracy from being a *jus cogens* offense because if neither the coastal state nor the apprehending state establishes jurisdiction, a third-party country may not intervene).

173. SUA, *supra* note 145, art. 6.

174. See Noyes, *supra* note 101, at 106–07 (discussing how certain definitions from treaties relating to the high seas contain information that is too vague to create bright-line rules governing piracy).

175. *Id.*

176. *Id.* at 108.

177. ILC REPORT 1956, *supra* note 50 (stating that acts of piracy are limited to waters that are outside the jurisdiction of states).

178. UNCLOS, *supra* note 18, art. 86.

179. *Id.*

180. Menefee, *supra* note 91, at 146.

portion of the treaty that covers piracy also applies to the EEZ insofar as those articles are not incompatible with the rights of coastal states, that inclusion does not ameliorate the situation where a coastal state is incapable of policing or enforcing these delegated rights.<sup>181</sup>

Interestingly, the ILC took a different approach with respect to piracy in “unoccupied territory,” and stated that “in considering as ‘piracy’ acts committed in a place outside the jurisdiction of any State . . . the Commission did not wish to exclude acts committed . . . within a larger unoccupied territory, since it wished to prevent such acts committed on *ownerless territories* from escaping all penal jurisdiction.”<sup>182</sup> It is difficult to imagine how different such “ownerless” territories are from the “high seas,” where state authority is virtually non-existent. As “ownerless” territories present the same problem as the “high seas,” it would be reasonable for those territories to fall within the purview of Article 101 of the UNCLOS.

### III. UNITED NATIONS: THE SECURITY COUNCIL’S LEGAL RESPONSES TO PIRACY AND ITS FAILED EFFORTS

The United Nations is empowered to trump claims of sovereignty when it acts in the interest of international peace and security.<sup>183</sup> Recourse to Article 103 of the U.N. Charter, which has permitted the adoption of several resolutions in circumvention of Article 111(3) of the UNCLOS, has not been sufficient to provide for a prosecutorial regime.<sup>184</sup> In light of this loophole in the UNCLOS, the “United Nations Security Council responded proactively throughout 2008, [to the recent rise in piracy], by adopting Resolutions that for the first time conferred upon maritime powers the capacity to enter Somali waters to conduct anti-piracy operations and to facilitate the prosecution of suspected pirates.”<sup>185</sup> The situation in Somalia probably did not constitute a threat to international peace and security.<sup>186</sup> Still, most of the recent U.N. Security Council Resolutions

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181. UNCLOS, *supra* note 18, art. 58.

182. ILC REPORT 1956, *supra* note 50, at 282 (emphasis added).

183. U.N. Charter art. 2, para. 7 (providing that the United Nations is not to intervene in the matters which are essentially within the domestic jurisdiction of any state, but that this principle “shall not prejudice the application of enforcement measures under Chapter VII”).

184. *See id.* art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).

185. Rothwell, *supra* note 16.

186. *But see Al Qaeda Fighters Move into Horn of Africa, Officials Say*, CNN.COM, June 12, 2009, <http://www.cnn.com/2009/POLITICS/06/12/alqaeda.africa/index.html>

have been created under Chapter 7 of the U.N. Charter, implying that they are legally binding on all states.<sup>187</sup>

In Resolution 1872, passed in 2009, the U.N. Security Council recognized that instability in Somalia fostered the problem of piracy and that combating piracy and its underlying causes will require a comprehensive response.<sup>188</sup> If the situation in Somalia was left alone, the Council recognized, it would continue to pose a threat to international peace and security in the region.<sup>189</sup> The Council has in the past recognized “the Transitional Federal Government’s (TFG) inability to interdict, or upon interdiction to *prosecute* pirates or to patrol and secure the waters off the coast of Somalia . . . .”<sup>190</sup> In response to the lacuna in the UNCLOS,<sup>191</sup> the U.N. Security Council adopted Resolution 1816, which authorizes states that cooperate with the Somali TFG to “enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at seas.”<sup>192</sup> Although the intervention of the Council through its various resolutions helped to fill some gaps in the UNCLOS by extending enforcement jurisdiction, jurisdictional loopholes remain, and they are compounded by the lack of political will of some members of the international community to engage in law enforcement.<sup>193</sup> One critical shortcoming of the Council’s responses is that they are limited in scope because they deal solely with the situation in Somalia. They do not extend to pirate attacks that may take place off adjacent coasts or in other parts of the world.<sup>194</sup> From a normative standpoint, the U.N. Resolutions do not attempt to establish customary international because they restrict their application to only the particular situation in Somalia.<sup>195</sup>

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(noting that officials believe that al-Qaeda is setting up headquarters in Somalia and Yemen).

187. Article 25 of the United Nations Charter provides that “Members of the United Nations agree to accept and carry out the decisions of the Security Council.” U.N. Charter art. 25. Some of the Resolutions taken under Chapter Seven include: Resolution 1872 and Resolution 1851. See S.C. Res. 1872, U.N. Doc. S/RES/1872 (May 26, 2009); S.C. Res. 1851, *supra* note 1.

188. S.C. Res. 1872, *supra* note 187.

189. *Id.*

190. S.C. Res. 1851, *supra* note 1 (emphasis added).

191. See *supra* Part II (observing, among other things, that the definition of piracy excludes criminal acts occurring in the territorial sea of a coastal state, which would otherwise qualify as acts of piracy).

192. S.C. Res. 1816, ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008).

193. Rothwell, *supra* note 16.

194. *Id.* (noting, for example, that the Resolutions do not address pirate attacks off the coast of nearby Kenya).

195. See, e.g., S.C. Res. 1851, *supra* note 1 (providing that “this resolution shall not be considered as establishing customary international law”).

As subsequent events since the passage of these Resolutions have shown, the global piracy problem has only been exacerbated. Apart from Somalia, other areas experiencing more frequent acts of piracy include the Gulf of Guinea near Nigeria and Niger, the Malacca Strait between Indonesia and Malaysia, and the Indian subcontinent between India and Sri Lanka. Under these circumstances, the United Nations should move toward a more permanent and resolute piracy enforcement mechanism.

As piracy activities off the Somali coast escalated, the U.N. Security Council was prompted to adopt Resolution 1838 in September, 2008. The Resolution called upon U.N. member states with “naval vessels and military aircraft operat[ing] on the high seas and airspace off the coast of Somalia to use . . . the necessary means, in conformity with international law . . . for the repression of acts of piracy.”<sup>196</sup> One month later, the Council renewed Resolution 1816 with the adoption of Resolution 1846, an action that extended the international community’s mandate for an additional twelve months.<sup>197</sup> The Resolution permitted operations in Somali waters and allowed the international community to operate on land where pirates could potentially plan or begin to undertake acts of piracy.<sup>198</sup>

#### IV. INTERNATIONAL TRIBUNAL ON THE LAW OF THE SEA AND PIRACY

To stem the rising tide of piratical activities, which have so far defied international efforts, it is necessary to assure would-be pirates that they cannot perennially act with impunity. To this end, one proposal has been to create an ad hoc tribunal to deal with pirates.<sup>199</sup> Such an initiative would resolve the particular difficulties encountered in law enforcement in Somalia and would provide the international community with a better option than failing to prosecute suspected pirates.<sup>200</sup> Because it is acknowledged that this would only be a temporary solution, others have proposed a permanent International Piracy Tribunal, modeled after the International Criminal Court (ICC), with special piracy jurisdiction.<sup>201</sup> Although the ICC provides a tested example with which the

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196. S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008).

197. S.C. Res. 1846, Preamble, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

198. S.C. Res. 1851, *supra* note 1.

199. Rothwell, *supra* note 16.

200. *Id.*

201. *Id.*

international community could work, such a new tribunal “would require detailed legal and political consideration.”<sup>202</sup>

One commentator has suggested that “[w]ith the United Nations Security Council recognising the threat to international peace and security posed by piracy and sea robbery, and being prepared to respond to the challenges by utilising its Chapter VII powers, it becomes a short step for the Council to establish an ad hoc ‘International Piracy Tribunal.’”<sup>203</sup> However, the United Nations has struggled to keep even its current tribunals operational and has at times resorted to hybrid tribunals—those with a mixture of national and international jurisdiction. Indeed, this is one reason why the United Nations supported the creation of the ICC.<sup>204</sup> With those lessons in mind, the United Nations may be very reluctant to establish another tribunal.

Over the years, states have prevented the adoption and enforcement of a coherent and effective regulation of relevant laws.<sup>205</sup> Until such regulation is established, there can only be ad hoc solutions to the problem of piracy.<sup>206</sup> Because piratical acts committed inside the jurisdictional sovereignty of the coastal state are regarded as acts of robbery, and not piracy, coastal states are not required, and have no incentive, to pursue international cooperation in combating such acts.<sup>207</sup> While this system certainly reflects that state sovereignty is highly valued, the international community rejected the idea that state sovereignty is absolute when it adopted a series of international human rights agreements permitting intervention when a country’s government commits atrocities against its own citizens.<sup>208</sup>

It is inconceivable that piracy, a crime regarded as one that is committed against the human race, should not be suppressed and prosecuted at the international level as effectively as other internationally cognizable offenses. Not only does the UNCLOS fail

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202. *Id.*

203. *Id.*

204. Tom Dannenbaum, *Crime Beyond Punishment*, 15 U.C. DAVIS J. INT’L LAW & POL’Y 189 (2009).

205. See Jesus, *supra* note 109, at 367–68 (noting that piracy is widely recognized as an international problem, but that individual states have not been receptive to international solutions).

206. *Id.* at 368.

207. *Id.* at 372.

208. See, e.g., U.N. Charter art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”).

to impose any obligation on its signatory state parties to prosecute and punish pirates, it also leaves discretion to each state to decide whether or not the state will exercise jurisdiction to try suspected pirates and to what extent it will punish those convicted of the crime.<sup>209</sup> But this jurisdiction may or may not be exercised by the state in question. This permissive regime is a lacuna in international law that exists in the wake of what are becoming increasingly violent seas.<sup>210</sup> Piracy demands both universal jurisdiction as well as international jurisdiction.

A. *Universal Jurisdiction and International Jurisdiction*

The prospect of creating a permanent Piracy Tribunal is unlikely given the resource constraints faced by the United Nations and the length of time it takes to negotiate international agreements. Some propose, instead, an expansion of the jurisdiction of the ICC.<sup>211</sup> This accommodation, however, would create logistical issues. For example, the Statute of the ICC would have to be amended to include the specific crime of piracy. Considering how long it took to conclude the Rome Statute of the ICC, and because important actors like the United States are still on the sidelines in that regard,<sup>212</sup> this would, perhaps, not be a viable solution.

The establishment of a special international tribunal has been criticized on the ground that it leaves the crime of piracy under the domain of traditional universal jurisdiction, which would permit any state to prosecute suspected pirates, regardless of their nationality, as long as they are found in the territory of the prosecuting state. The seriousness of international piracy has been recognized since ancient times, hence the designation of pirates as *hostis humani generis*—a common enemy or enemy of all humankind.<sup>213</sup> For the most part, the enforcement of international law regarding piracy has historically

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209. Jesus, *supra* note 109, at 374–75.

210. The IMO publishes yearly reports detailing the total numbers of violent acts committed by pirates. See, e.g., IMO ANNUAL REPORT 2008, *supra* note 135, ¶ 6 (noting that in 2008, crews were violently attacked by “groups of five to ten people carrying knives or guns” and that 6 crew members were killed, 42 were injured, 774 were kidnapped or held hostage, and 38 are still missing).

211. See, e.g., Bahar, *supra* note 2, at 26 (suggesting that piracy be added to the Rome Statute of the ICC).

212. See generally Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals*, 158 U. PA. L. REV. 39 (2009) (describing the history and constitutionality of the American participation (or lack thereof) in international courts like the ICC).

213. See Erik Barrios, *supra* note 101, at 149, 152 (recognizing that “international law treats piracy as a universal crime” because it “can inflict harm upon all states”).

been left to municipal courts.<sup>214</sup> A pirate's actions have always been considered as so contrary to fundamental norms that they are universally proscribed, and thus the pirate is subject to punishment by all courts. In fact, in *United States v. Smith*,<sup>215</sup> the U.S. Supreme Court—describing piracy as “robbery, when committed upon the sea”—acknowledged that piracy is “an offence against the universal law of society, a pirate being deemed an enemy of the human race.”<sup>216</sup> Even though a few states are willing “to try pirates whose nationality, vessel and victims are totally unconnected to [that state],” with the volume and frequency of piracy cases on the rise, the current jurisdictional laws have proven insufficient.<sup>217</sup> Contemporary piracy is a completely different threat than traditional piracy envisioned under the UNCLOS. An effective response requires more than ad hoc or piecemeal efforts such as U.N. Security Council resolutions or impromptu tribunals, which are only tools used to curtail the jurisdictional sovereignty of states.

Moreover, universal jurisdiction tends to increase interstate tensions, and extending the definition of piracy to include acts motivated by political ends would only exasperate such tensions.<sup>218</sup> The International Court of Justice (ICJ) has had to settle cases where

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214. Noyes, *supra* note 101, at 105.

215. 18 U.S. (5 Wheat.) 153 (1820).

216. *Id.* at 161–62. In the *S.S. Lotus* case, heard by the Permanent Court of International Justice in 1927, John Bassett Moore stated, “[A]s the scene of the pirate’s operations is the high seas, which is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish.” The *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10., at 65, 70 (Moore, J., dissenting); *see also* *Harmony v. United States*, 43 U.S. (2 How.) 210, 232 (1844) (recognizing that piracy is a universal crime); *United States v. Chapels*, 25 F. Cas. 399, 403 (C.C.D. Va. 1819) (finding that piracy is a universal crime punishable by all nations); *United States v. Jones*, 26 F. Cas. 653, 655, 658 (C.C.D. Pa. 1813) (finding that the defendant was not guilty of piracy for acts committed against the Portuguese *Triumph of Mars*, but acknowledging that piracy is a felony under the laws of the United States).

217. Noyes, *supra* note 101, at 115.

218. For example, Henry Kissinger argues that universal jurisdiction can be employed to “settle political scores.” Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFFAIRS 86, 88 (2001). He also argues that such jurisdiction is likely to “subject the accused to the criminal procedures of the magistrate’s country, with a legal system that may be unfamiliar to the defendant and that would force the defendant to bring evidence and witnesses from long distances.” *Id.* at 90. Diane Orentlicher argues that when “a court exercises universal jurisdiction . . . it judges conduct that took place within another country in light of law that was developed through processes that transcend both states’ lawmaking institutions.” Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1063 (2004). But Kenneth Roth thinks that this “fear . . . is overblown,” and points out that “[g]overnments regularly deny extradition to courts that are unable to ensure high standards of due process.” Kenneth Roth, *The Case for Universal Jurisdiction*, 80 FOREIGN AFFAIRS 150, 153 (2001).

Belgium tried to exercise such jurisdiction regardless of the underlying merits of the case.<sup>219</sup> In recent times, Belgium and other nations have also been discredited for engaging in selective prosecution.<sup>220</sup> Universal jurisdiction leaves the question of “who to prosecute” solely to the discretion of each state, whereas international jurisdiction commits the international community as a whole to act in a concerted way to combat piracy.

Some countries have been reluctant to invoke universal jurisdiction to prosecute suspected pirates. However, a few European countries that have expressed doubts about prosecuting Somali pirates have been at the forefront of exercising universal jurisdiction through other means. For example, “France, one of the more active nations in the piracy campaign, regularly resorts to repatriation of pirates to Somalia.”<sup>221</sup>

International law works best when nations cooperate to resolve a common problem that no single country is willing or able to engage unilaterally, except at a great cost. Pirates cannot be allowed to succeed, as there is simply too much at stake. One major shortcoming in the efforts to thwart piracy has been the lack of an established international criminal tribunal that can administer international criminal justice against suspected pirates. This deficiency has been exposed by the gravity and intractability of contemporary piracy.<sup>222</sup> Without much discussion of pros and cons, some commentators have suggested that “the time is now ripe to consider the creation of a specialist international criminal tribunal to deal with pirates.”<sup>223</sup> The benefit of “[s]uch a Tribunal [is that it] would be able to prosecute individuals responsible for acts of piracy

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219. See, e.g., Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 9 (14 Feb.) (discussing a Belgian law that purports to grant Belgian courts universal jurisdiction where there are grave breaches of international law).

220. For example, Belgium and Spain have had to limit the scope of their universal jurisdiction laws in order to avoid prosecuting former officials of the Bush administration, an action that would have likely caused serious political tensions between the United States and the two nations. See, e.g., Marlise Simons, *Spanish Court Weighs Inquiry on Torture for 6 Bush-Era Officials*, N.Y. TIMES, Mar. 29, 2009, at A6 (reporting that a Spanish court had “taken the first steps toward opening a criminal investigation into allegations that six former high-level Bush administration officials violated international law by providing the legal framework to justify the torture of prisoners at Guantánamo Bay, Cuba,” but also noting that “some American experts said that even if warrants were issued their significance could be more symbolic than practical, and that it was a near certainty that the warrants would not lead to arrests if the officials did not leave the United States”).

221. Kontorovich, *supra* note 14.

222. See generally Rothwell, *supra* note 16 (discussing the recent upsurge in piracy and the need for “a more comprehensive legal regime dealing with threats to maritime security”).

223. *Id.*

under the UNCLOS or crimes against international shipping as envisaged under the SUA Convention.”<sup>224</sup>

Without a doubt, there are risks that come with having multiple tribunals; a primary concern is the possibility that inconsistent jurisprudence will be created. From its inception, some have argued against the existence of the ITLOS and its jurisdiction because the ICJ and its predecessor—the Permanent Court of International Justice—had already produced jurisprudence relating to disputes concerning the law of the sea.<sup>225</sup> They argued further that the ITLOS, at best, amounts to a duplication of previous efforts and, at worst, risks the creation of inconsistent jurisprudence. Still, the advantages of the ITLOS can be succinctly summed up as follows:

New economic and scientific uses of the seas are also on the increase, raising new legal questions which the Tribunal is well-placed to answer with its expertise and state-of-the-art facilities. Use of the Tribunal by States, international organizations or private entities for contentious or advisory proceedings can only serve to enhance the harmonized implementation of the Convention . . . and help reinforce coherence in international law.<sup>226</sup>

It seems that piracy is so intrinsically linked to the regime of the Law of the Sea that it would be a natural step to designate enforcement jurisdiction to the ITLOS. Determining whether such a step would be appropriate, however, requires an examination of the competency of the ITLOS.

### B. *The ITLOS Under Consideration*

To begin, the UNCLOS does not authorize the ITLOS to hear piracy cases brought against individuals, hence it provides no personal jurisdiction. Whereas any of the signatories to the International Covenant on the Law of the Sea can bring a case to the ITLOS, its jurisdiction is limited to the provisions of the treaty.<sup>227</sup> The

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224. *Id.*

225. *See, e.g.*, Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 6 (25 July) (concerning dispute over Iceland’s jurisdictional waters); Fisheries Jurisdiction (F.R.G. v. Ice.), 1974 I.C.J. 175 (25 July) (same).

226. Rüdiger Wolfrum, President of the Int’l Tribunal for the Law of the Sea, Statement of Acceptance of the ‘Award for Meritorious Contribution Towards the Development, Interpretation and Implementation of International Maritime Law,’ presented to the International Tribunal for the Law of the Sea, on the occasion of the 2008 Graduation Ceremony of the IMO (May 3, 2008), *available at* [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (follow “Statements of the President” hyperlink under “News”; then follow “Statements of President Wolfrum 2005–2008” hyperlink).

227. *See, e.g.*, UNCLOS, *supra* note 18, art. 292 (“The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release . . .”).

ITLOS is part of the UNCLOS compulsory third-party dispute resolution mechanism.<sup>228</sup> Arguably, states might invoke the provisions of the UNCLOS on compulsory settlement of disputes in order to bring interstate disputes over the interpretation of the UNCLOS provisions on piracy to a tribunal.<sup>229</sup> The chances of that happening, though, are low, because states are often reluctant to bring their citizens' cases before international tribunals.<sup>230</sup> The UNCLOS does not explicitly compel or authorize a particular tribunal to hear piracy cases brought against individuals.<sup>231</sup> Article 105 provides:

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 or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.<sup>232</sup>

Under the UNCLOS, all dispute-settlement procedures are open only to state parties.<sup>233</sup> In addition, the UNCLOS provides only limited possibilities for individual access to the ITLOS.<sup>234</sup> So far, the Tribunal only entertains cases in which individuals' cases are espoused by the flag state. In the *M/V Saiga (No.2) Case (Saint Vincent v. Guinea)*,<sup>235</sup> the ITLOS held that it is the obligation of the flag state to espouse claims of the people on a vessel even if they have different nationalities because the vessel must be viewed as a "unit."<sup>236</sup> The ITLOS stated:

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228. *Id.* arts. 286–87.

229. Noyes, *supra* note 101, at 113.

230. *See, e.g.*, Nottebohm Case (Liech.v. Guat.), 1955 I.C.J. 4 (6 Apr.). In the *Nottebohm* case, Guatemala opposed Liechtenstein's claim to espouse Nottebohm's complaint against Guatemala on the basis that he was a naturalized citizen of Liechtenstein. *Id.* at 12–13. In fact, Nottebohm had never lived in Liechtenstein but had instead lived in Guatemala for thirty-four years. *Id.* at 25. The case illustrates the difficulties involved with relying on diplomatic protection in proceedings before international tribunals that do not allow individual access. In an even more pertinent example, Canada refused to espouse the case of a corporation registered in Canada even though the ICJ ruled that it was Canada—and not Belgium—that had the right to bring the case against Spain. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1964 I.C.J. 6, 14, 62, 83 (24 July).

231. *See* John E. Noyes, *Compulsory Third-Party Adjudication and the 1982 United Nations Convention on the Law of the Sea*, 4 CONN. J. INT'L L. 675, 684 (1989) (noting that the UNCLOS leaves some control of the adjudication process to states by providing them "with four options for formal adjudication").

232. UNCLOS, *supra* note 18, art. 105 (emphasis added).

233. *Id.* art. 291.

234. UNCLOS, *supra* note 18, at Annex VI, art. 20.

235. 120 I.L.R. 143 (Int'l Trib. L. of the Sea 1999).

236. *Id.* ¶ 106.

The provisions . . . indicate that the Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.<sup>237</sup>

The ITLOS can play an important role in countering international piracy. The current president of the ITLOS, José Luis Jesus, has stated that the Tribunal is “ready to judge each piracy case that states want it to deal with.”<sup>238</sup> With respect to the powers of the ITLOS, the president has said the Tribunal, acting as a full court,

may give an advisory opinion . . . as provided for in article 138 of the Rules. This article further indicates that the request for an advisory opinion is to be transmitted to the Tribunal by “whatever body” is authorized under such an agreement to do so. As the international community faces new challenges in ocean activities, such as *piracy and armed robbery, advisory proceedings before the Tribunal on legal questions concerning the application and interpretation of provisions of the Convention may prove to be a useful tool to States.*<sup>239</sup>

It may not be necessary to look any further than to the UNCLOS and to the Statute of the ITLOS for such a tool.<sup>240</sup> Because flag states rarely demonstrate interest in prosecuting pirates, the following question arises: Can a person on a ship with a nationality other than that of the flag state have his nation of origin bring his case before the Tribunal? Because issues of conflict of jurisdiction can arise, the U.N. Security Council called “upon all States . . . of victims and perpetrators of piracy and armed robbery . . . to cooperate in

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237. *Id.*

238. *UN Sea Court Ready to Judge Piracy Cases: Report*, OTTAWA CITIZEN, Apr. 22, 2009, [http://www.ottawacitizen.com/story\\_print.html?id=1523227&sponsor=](http://www.ottawacitizen.com/story_print.html?id=1523227&sponsor=).

239. H.E. José Luis Jesus, Statement by President of the International Tribunal For the Law of the Sea On Agenda Item 70(a) at the Plenary of the Sixty-Third Session of the United Nations General Assembly, ¶ 9 (Dec. 5, 2008) (emphasis added), available at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (follow “News” hyperlink to “Statements of the President” hyperlink).

240. Under the UNCLOS, the ITLOS has “jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of [UNCLOS], which is submitted to it in accordance with the agreement.” UNCLOS, *supra* note 18, art. 288, ¶ 2. Under the Statute of the International Tribunal for the Law of the Sea (Annex VI of the UNCLOS), the jurisdiction of the Tribunal includes all matters specifically provided for in any agreement, other than the Convention, which confers jurisdiction upon the Tribunal. *Id.*, annex VI, art. 21.

determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy.”<sup>241</sup>

Just as the United Nations refers certain cases to the ICC, the United Nations should refer cases to the ITLOS once that Tribunal is determined to be an appropriate body for enforcement purposes.

#### V. ENFORCEMENT OF PIRACY PROVISIONS: NATIONAL AND REGIONAL

International strategies to enforce piracy laws must always remain complementary to national strategies. This must also be the case with respect to international human rights laws and international criminal laws.<sup>242</sup> To that end, it is important that states develop and strengthen national approaches to combating piracy.

With respect to national efforts, much remains to be done to ensure that normative and enforcement regimes are both comprehensive and effective. Piracy law at the national level is different from international piracy law in several respects. In cases involving municipal crimes relating to piracy, jurisdiction is reserved to the nation state. The jurisdiction of a state over acts of piracy is based upon nationality or territoriality, and coastal states have the sole jurisdiction to prosecute and punish acts of piracy committed within their internal waters, territorial sea, and on their flag ships.<sup>243</sup> There must be a genuine link between the state and the ship, or between the state and the waters on which an offense takes place. The ability of a flag state to apply and enforce its own laws with respect to piracy and sea robbery taking place in the waters of another state depends on whether the pirate ship or the pirates have the nationality of that state, or the degree to which the national law of the enforcing state makes piracy a universal crime that is subject to arrest and prosecution throughout the world.<sup>244</sup>

In the *S.S. Lotus* case,<sup>245</sup> the Permanent Court of International Justice held that “vessels on the high seas are subject to no authority

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241. S.C. Res. 1846, *supra* note 197.

242. See, e.g., Rome Statute of The International Criminal Court, art. 17(1)(a), July 1, 2002, 2187 U.N.T.S. 90 (providing that a case is inadmissible before the International Criminal Court if it “is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”).

243. Rothwell, *supra* note 16.

244. James Kraska & Brian Wilson, *The Pirates of the Gulf of Aden: The Coalition Is the Strategy*, 45 STAN. J. INT’L L. 243, 268 (2009) (noting that many states’ criminal law does not extend beyond the boundaries of the territorial sea and that it is unlikely that such nations will be able to prosecute pirates).

245. (*Fr. v. Turk.*), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

except that of the State whose flag they fly.”<sup>246</sup> Article 92 of the UNCLOS codifies this principle,<sup>247</sup> but excepts cases where the vessel is without nationality or where the vessel is engaged in piracy, slavery, or unauthorized broadcasting.<sup>248</sup> The practice of using open registries complicates matters. Many African states use open registries because they have limited resources available to them to register ships. The problem is that open registries create a loophole that protects pirates by enabling vessels without nationality and vessels flying under the flag of a state without effective enforcement jurisdiction to become “floating sanctuaries from authorities.”<sup>249</sup> If flag states are incapable of effectively exercising control over the ships they have registered, how can they be expected to enforce piracy laws at all? Yet, there is no requirement for a genuine link to the flag state. In other words, there is no requirement that the flag state be capable of fulfilling its obligations pertaining to the status of a flag state.<sup>250</sup> In piracy cases, and in cases involving the ineffective enforcement regimes of flag states, universal jurisdiction could be invoked, but such jurisdiction can only provide a remedy but cannot provide a means to prevent piracy in the first instance.

Several countries have enacted their own domestic legal regimes to deal with acts analogous to piracy that occur in their own territorial waters. For example, the U.S. Constitution empowers Congress to define and punish piracy.<sup>251</sup> Pursuant to this constitutional empowerment, the U.S. Congress has authorized the prosecution and punishment of any person who, “on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought

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246. *Id.* at 25.

247. UNCLOS, *supra* note 18, art. 92.

248. *Id.* art. 110.

249. *United States v. Marino-Garcia*, 679 F.2d 1373, 1382 (11th Cir. 1982) (“Vessels without nationality are international pariahs. . . . Moreover, flagless vessels are frequently not subject to the laws of a flag-State. As such they represent ‘floating sanctuaries from authority’ and constitute a potential threat to the order and stability of navigation on the high seas.” (citations omitted)); see George D. Gabel, Jr., *Smoother Seas Ahead: The Draft Guidelines as an International Solution to Modern-Day Piracy*, 81 TUL. L. REV. 1433, 1439–40 (2007) (explaining that “[r]egistration in flags-of-convenience states is easy and may be completed often without inspection of the vessel” and that many countries were motivated to open registries mainly so that they could partake in the cash flow generated by the registration of ships, but that the loosening of standards provided “fertile ground for growth in piratical acts”).

250. In *M/V Saiga (No. 2) Case (Saint Vincent v. Guinea)*, the ITLOS found that there was nothing in UNCLOS that entitled other states to reject a vessel’s nationality on the ground that the flag state was incapable of exercising proper jurisdiction. 120 I.L.R. 143, ¶¶ 82–86 (Int’l Trib. L. of the Sea 1999).

251. See U.S. CONST. art. I, § 8, cl.10 (“The Congress shall have Power . . . to define and punish piracies and felonies committed on the high seas, and offences against the Law of Nations.”).

into or found in the United States.”<sup>252</sup> Moreover, the U.S. Congress passed the Hostage Taking Act, which provides that whoever seizes an American national abroad in order to obtain a ransom for the release of that national “shall be punished by imprisonment for any term of years or for life, and if the death of any person results, shall be punished by death or life imprisonment.”<sup>253</sup>

Not all countries have specific laws or provisions in their penal codes that deal with piracy. In fact, some countries do not define piracy in their laws,<sup>254</sup> nor do they criminalize acts of piracy on the high seas or in their own Exclusive Economic Zones,<sup>255</sup> even if they wish to allow universal jurisdiction. Countries that do have piracy provisions in their laws define the crime differently depending on their needs. For example, until recently, the Japanese piracy law did not allow Japanese defense forces to operate beyond the shores of Japan, which meant that pirates could target vessels flying under the Japanese flag outside of Japanese waters without fear that they would be captured by Japanese forces.<sup>256</sup> As a consequence of its domestic law, Japan was unable to contribute to an international effort to capture pirates beyond its shores.

The lack of uniformity in the definition of piracy throughout the world,<sup>257</sup> in conjunction with the complete absence of any definition of piracy in some countries, will continue to impede efforts to reduce

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252. 18 U.S.C. § 1651 (2006); *see also* 18 U.S.C. §§ 960–67 (2006) (pertaining to foreign relations matters involving piracy); 33 U.S.C. §§ 381–87 (2006) (regarding regulations for suppression of piracy).

253. 18 U.S.C. § 1203 (2006). Some commentators have noted that, even though U.S. domestic law is in place to prosecute piracy, there is a possibility that a due process constitutional challenge may render enforcement of the piracy law unconstitutional. *See, e.g.,* Noyes, *supra* note 101, at 117 (arguing that 18 U.S.C. § 1651 might violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution because the law may not afford fair notice about wrongful conduct, and asserting that § 1651’s reference to the “law of nations”—which is not sufficiently specific—might run afoul of the constitutional requirement that the law be clear on its face).

254. William P. Willig, Comment, *The Santa Maria Incident: A Grey Zone Between Unrecognized Insurgency on the High Seas and Piracy Jure Gentium*, 25 ALB. L. REV. 299, 303 (1961).

255. Robert C. Beckman, *Issues of Public International Law Relating to Piracy and Armed Robbery Against Ships in the Malacca and Singapore Straits*, 3 SING. J. INT’L & COMP. L. 512, 518 (1999).

256. *See* Editorial, *Anti-Piracy Law*, THE JAPAN TIMES, June 23, 2009. Japan’s new antipiracy law now allows Japanese Self-Defense Forces to protect commercial ships, both Japanese and non-Japanese, from pirates operating beyond Japanese waters. *See id.* (“The Diet has enacted a law that will enable the dispatch of [Japanese] Forces . . . any time and anywhere in the world.”).

257. Zou Keyuan, *Issues of Public International Law Relating to the Crackdown of Piracy in the South China Sea and Prospects for Regional Cooperation*, 3 SING. J. INT’L & COMP. L. 524, 535 (1999).

incidents of piracy. Clearly, the improvement of domestic laws, especially those pertaining to jurisdiction over piracy, is vital to ensuring an effective enforcement regime.

*A. Regional Enforcement of Piracy Law*

The idea of regional cooperation is certainly not new, and many successes have been realized as a result of such cooperation in areas such as human rights, security, and trade. Therefore, previous efforts to cooperate on a regional level may be worth emulating in order to combat other threats that are both regional and international in nature. The U.N. Charter underscores the importance of regional cooperation.<sup>258</sup> Regionalism may have thrived in the past due to the conditions of the Cold War, and although it is certainly not flourishing today, its many advantages have kept the concept alive.<sup>259</sup> In targeting the specific problem of piracy, the U.N. Security Council has accentuated the importance of regional cooperation in some of its resolutions. For example, the Council called on “States, [and] regional and international organizations that have the capacity to do so, to take part actively in the fight against piracy and armed robbery at sea off the coast of Somalia,” and encouraged “all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to consider creating a centre in the region to coordinate information relevant to piracy and armed robbery at sea off the coast of Somalia.”<sup>260</sup>

Hot pursuit is one area in particular that could significantly benefit from increased regional enforcement. Hot pursuits often begin in the “internal waters, territorial waters, contiguous zones or the EEZs of the coastal states.”<sup>261</sup> But the right to pursue ends as soon as a chase enters the territorial waters of a third state.<sup>262</sup> Regional cooperation could remedy this and other problems associated with piracy. As the Secretary General of the IMO remarked:

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258. See generally U.N. Charter arts. 52–54 (encouraging the development of regional arrangements).

259. Regional cooperation is based on factors such as social and cultural homogeneity, similarity of attitudes and social patterns of behavior, common goals, political and/or economic interdependence, and strong geographical contiguity, among others. Eibe Reidel, *The Progressive Development of International Law at the Universal and Regional Level*, in STRENGTHENING THE WORLD ORDER: UNIVERSALISM V. REGIONALISM 115, 132 (1990). Regional arrangements carry greater global legitimacy than do global arrangements because they are less likely to be seen as impositions.

260. S.C. Res. 1851, *supra* note 1.

261. Keyuan, *supra* note 257, at 538.

262. *Id.*

Looking to the future, it seems clear to me that . . . the long-term solution to the problem of piracy and armed robbery off the coast of Somalia and in the Gulf of Aden . . . should be looked for within the region itself. Strong and coordinated coast guard and law enforcement capabilities; appropriate and workable legal provisions so that the perpetrators of the crime of piracy do not escape with impunity for their acts . . . [—]all these are necessary if the rule of law is to hold sway . . . [and] most of them are currently missing from Somalia and the adjacent region.<sup>263</sup>

Regional cooperation can help states avoid potential jurisdictional conflicts and can reduce costs. Furthermore, a legal framework for regional cooperation is already in place. Article 123 of the UNCLOS provides a basis for state parties to the treaty to cooperate in the suppression of piracy.<sup>264</sup>

### B. *Effective Strategies*

South East Asia stands out as a success story of how regionalism can be used to combat piracy. Sixteen nations in that region signed the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)<sup>265</sup>—the first treaty dedicated solely to combating piracy—following a spate of incidents of piracy in the area. The agreement obligates signatory parties to extradite pirates who are present in their territories to the territories of other signatory parties upon their request.<sup>266</sup> Perhaps it is now time for other regions to adopt similar regional agreements to combat piracy. However, it is important to point out that based on statistics compiled by the IMO—including South East Asia where regional cooperation was implemented and every country in that region made piracy a punishable crime—the results were modest and failed to reduce piratical acts in any substantial manner.<sup>267</sup>

The UNCLOS provides that “[a]ll States shall cooperate to the fullest extent possible in the repression of piracy on the high seas . . . .”<sup>268</sup> This may include the creation of regional agreements.<sup>269</sup> The IMO has concluded that “[r]egional cooperation among States has an important role to play in solving the problem of piracy and armed

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263. Efthimios E. Mitropoulos, Secretary-General, International Maritime Organization, Welcoming Remarks (Feb. 24, 2009), *available at* [http://www.imo.org/newsroom/mainframe.asp?topic\\_id=1774&doc\\_id=11124](http://www.imo.org/newsroom/mainframe.asp?topic_id=1774&doc_id=11124).

264. UNCLOS, *supra* note 18, art. 123.

265. Apr. 28, 2005, 44 I.L.M. 829 [hereinafter ReCAAP].

266. *Id.* art. 12.

267. Jesus, *supra* note 109, at 369.

268. UNCLOS, *supra* note 18, art. 100.

269. *Id.* art. 311, ¶ 3.

robbery against ships, as evidenced by the success of the regional anti-piracy operation in the Straits of Malacca and Singapore.<sup>270</sup> Accordingly, the IMO sought to replicate the successes in South East Asia by facilitating regional cooperation in Somalia, the Gulf of Aden, and the Gulf of Guinea to combat contemporary piracy.<sup>271</sup> In January, 2009, the IMO facilitated the adoption of an important regional agreement in Djibouti among states in the region.<sup>272</sup> The regional cooperation resulted in the creation of the Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, an agreement that recognizes the extent of the problem of piracy and armed robbery against ships in the region.<sup>273</sup> In the agreement, signatories declared their intention to cooperate to the fullest possible extent, in a manner consistent with international law, in the repression of piracy and armed robbery against ships.<sup>274</sup> Significantly, the signatories agreed to commit themselves, among other things, to “ensuring that persons committing or attempting to commit acts of piracy or armed robbery against ships are apprehended and prosecuted.”<sup>275</sup>

As one commentator noted:

Seeking to replicate the success of ReCAAP, the IMO sponsored meetings in Tanzania and Djibouti to reach an agreement among the regional states of the Horn of Africa for developing a treaty against piracy in the western Indian Ocean. Once an agreement is reached among the States of East Africa, the maritime nations would embark on a program to build capacity for investigative and judicial action. If nations in East Africa develop the legal architecture to deal with piracy, including lawyers, courtrooms and confinement facilities, they would be more willing and better able to enforce the maritime rule of law in the western Indian Ocean.<sup>276</sup>

Replicating the South East Asian experiment, however, in East Africa or the other regions of Africa, where geographical, economic,

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270. Int'l Maritime Org., Piracy and Armed Robbery against Ships, <http://www.imo.org> (follow “Facilitation” hyperlink; then follow “Piracy and Armed Robbery against Ships” hyperlink) (last visited June 3, 2010).

271. See Int'l Maritime Org., Piracy in Waters off the Coast of Somalia, <http://www.imo.org> (follow “Facilitation” hyperlink; then follow “Piracy and armed robbery against ships” hyperlink; then follow “Piracy in waters off the coast of Somalia” hyperlink) (last visited June 3, 2010).

272. Report of the Secretary-General, *supra* note 108, ¶ 9.

273. *Id.*

274. *Id.*

275. Piracy in Waters off the Coast of Somalia, *supra* note 271.

276. James Kraska & Brian Wilson, *Piracy Repression, Partnering and the Law*, 40 J. MAR. L. & COM. 43, 54–55 (2009).

and social conditions are vastly different from South East Asia, would be extremely difficult. Compared to the South East Asia region, the African region faces dire economic and structural challenges, including the fact that the South East Asia cooperation efforts were led by Japan—an economic powerhouse.<sup>277</sup> Although there is no similar power in East Africa, the pooling of resources and international assistance might help.<sup>278</sup>

Another distinction between the South East Asia region and East Africa region is the fact that the economies of all sixteen countries in South East Asia depend on maritime trade. Perhaps African countries, especially those without a significant shipping operation, might not see the urgency in developing a regional treaty for combating piracy. Indeed, given the poverty problem and other internal problems faced by many African states, it is unlikely that such states would individually or collectively devote significant time or resources to the fight against piracy.<sup>279</sup> The African Union has tried to pay attention to maritime trade, and to the extent that the continent is interested, has begun to build a framework to enforce piracy law on a regional level.<sup>280</sup> The African Union's Contact Group on Piracy off the Coast of Somalia (CGPCS) met in Cairo on March 16, 2009, and observed that

[n]eighboring States can play an essential role in addressing the phenomenon of piracy off the Somali coast. That role may include

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277. GROUP 4 OF THE CONTACT GROUP ON PIRACY OFF THE COAST OF SOMALIA, IMPROVING DIPLOMATIC AND PUBLIC INFORMATION EFFORTS ON ALL ASPECTS OF PIRACY 3, available at [http://www.africa-union.org/root/UA/Conferences/2009/mars/PSC/16MARSBIS/CGPCS\\_WG%204.pdf](http://www.africa-union.org/root/UA/Conferences/2009/mars/PSC/16MARSBIS/CGPCS_WG%204.pdf) (last visited June 3, 2010) [hereinafter WORKING GROUP 4] (noting that the primary causes of piracy off the Somali coast are the fragile political and security situation in the area along with the poor economic conditions).

278. In June 2009, the Somali transitional federal government established a new navy, in part, to combat piracy off its coast. *Analysts Skeptical New Somali Navy Can Fight Piracy*, VOANEWS.COM, June 18, 2009, <http://www.voanews.com/english/archive/2009-06/2009-06-18-voa34.cfm?CFID=279231309&CFTOKEN=27674671&jsessionid=0030d599e2410ad571f6387e20796b56312d>. But analysts observed that the real priority of the fledgling administration was to fight “for its survival against al-Shabab,” and they predicted that the administration’s focus would be “fighting the war on land.” *Id.* It is unrealistic to expect such a government to raise a competent navy at a time when it is struggling for its very survival. *Id.*

279. *See id.* (expressing doubt as to Somalia’s likelihood of success with respect to its efforts to end piracy because the country neglects its naval facilities and lacks experienced sailors and ships, especially with the near-daily battles between the U.N.-backed government and al-Qaida-linked militant groups).

280. WORKING GROUP 4, *supra* note 277, at 1 (explaining that the objective of the African Union’s Contact Group on Piracy off the Coast of Somalia is to establish “a wide public information campaign that includes outreach activities such as seminars and workshops and a coordinated media strategy”).

. . . sending a message to potential pirates that their territories will not act as a safe haven for pirates or a destination for the proceeds of piracy. They may also cooperate through joint training of their Coast Guards, and the harmonization of legislation governing piracy and armed robbery against ships to prevent impunity for pirates . . . .<sup>281</sup>

The United Nations has also pointed to efforts by the League of Arab States—a region that is arguably better financially resourced than the East Africa region. A report by the U.N. Secretary General noted that “[t]he League of Arab States held an extraordinary session of the Arab Peace and Security Council in Cairo on November 4, 2008 to examine the issue of piracy and armed robbery at sea off the coast of Somalia.”<sup>282</sup> The meeting called for closer cooperation and exchange of information between Arab States and relevant organizations like the IMO.<sup>283</sup> As one commentator has noted, “the Somali crisis has been entangled with complex regional conflict, which includes the Ethiopian-Eritrean impasse, the insurgency and counter-insurgency in the Ethiopia-Somali region, and the long-running tensions between Ethiopian and Somali security interests and territorial claims.”<sup>284</sup>

### C. *Comprehensive Approaches with a Focus on Somalia*

Legal solutions are important, but they need to be augmented with broader solutions that tackle the underlying causes of piracy. The U.N. Secretary General spoke of the need to “be mindful that piracy is a symptom of the state of anarchy which has persisted in [Somalia] for over 17 years” and that “anti-piracy efforts must be placed in the context of a comprehensive approach which fosters an inclusive peace process in Somalia and assists the parties to rebuild security [and] governance capacity. . . .”<sup>285</sup> The Somalis argue that piracy provides one of the only means of sustenance in dire humanitarian circumstances.<sup>286</sup> The rise in Somali piracy correlates with the incompetence of Somalia’s weak central government, the conditions of the country’s impoverished and stagnant economy, and the failure

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281. *Id.* ¶ 2.

282. Report of the Secretary-General, *supra* note 108, ¶ 9.

283. *Id.* ¶ 9.

284. *Developing a Coordinated and Sustainable Strategy for Somalia Before the Subcomm. on African Affairs of the S. Comm. on Foreign Relations*, 111th Cong. 17 (2009) (statement of Dr. Ken Menkhaus, Professor of Political Science, Davidson College).

285. *Piracy Problem Inseparable from Overall Somali Crisis, Ban Warns*, UN NEWS CENTRE, Dec. 16, 2008, <http://www.un.org/apps/news/story.asp?NewsID=29334&Cr=somalia&Cr1=piracy>.

286. Avast!, *supra* note 137, at 5.

of the international community to hold pirates accountable for their actions.<sup>287</sup> In fact, Somalia has not had an effective and functioning central government since 1991.<sup>288</sup> According to U.N. officials, piracy near Somalia began as a violent reaction to rampant illegal fishing by commercial fishing companies, mostly from European and Asian countries, which often operated with fake licenses.<sup>289</sup> Some have even attempted to justify piracy on the ground that it is the only feasible response to the intractable and inequitable economic world and the lingering effects of colonialism, neocolonialism, and imperialism.<sup>290</sup> Despite these justifications, the United Nations has “[e]mphasiz[ed] that peace and stability, the strengthening of State institutions, economic and social development and respect for human rights and the rule of law are necessary to create the conditions for a full eradication of piracy.”<sup>291</sup>

Because piracy has political, economic, security, and humanitarian dimensions, the international response must be similarly comprehensive and multifaceted. There certainly is a need to address the socioeconomic root causes of piracy and a need to tackle this issue through a comprehensive approach.<sup>292</sup> The example of Somalia, where pirates share multi-million-dollar ransoms in an

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287. See Kraska & Wilson, *supra* note 276, at 44 (“Piracy seldom takes place in isolation, frequently occurring in concert with severe poverty, weak or no governance and economic stagnation. Piracy is experiencing a renaissance, in part, because of the dire situation within Somalia. The average annual income is estimated to be \$650. One attack can yield \$10,000 for a working-level pirate. It is not surprising that at least 1,400 Somali men are associated with organized criminal gangs that are engaged in piracy. A pirate leader said, ‘When evil is the only solution, you do evil.’”); see also Bahar, *supra* note 2, at 19 (“Since 1991, Somalia has had no functioning government, no real laws, and no enforcement power. When asked why he and his compatriots were caught with weapons, one of the ten suspected Somali pirates simply responded to me, ‘I am Somali; the gun is our government.’”).

288. Bahar, *supra* note 2, at 19.

289. Stephanie McCrummen, *Somalia’s Godfathers: Ransom-Rich Pirates*, WASH. POST, Apr. 20, 2009, at A1, A8 (explaining that the foreign fishing vessels’ crews would spray Somali fishing vessels with hot water and bullets, sinking their boats and/or injuring some of them, and that it was in response to such show of force that Somali fishermen started to carry AK-47 assault rifles and rocket-propelled grenades and took ransom in order to attend to the wounded).

290. Piracy has not always had a negative connotation. See, e.g., A.T. Whatley, *Historical Sketch of the Law of Piracy*, 3 LAW MAG. & REV. 536, 536–37 (1874) (observing that “[a]mong the ancients . . . [s]o far from being a disgrace, and an illegal occupation, [piracy] was considered an honourable calling,” until international commerce grew and, with it, the necessity to protect it).

291. S.C. Res. 1838, *supra* note 196; S.C. Res. 1846, *supra* note 197.

292. See WORKING GROUP 4, *supra* note 277, at 1–4 (recommending the establishment of a public information campaign, the development of diplomatic efforts to bring political and security stability to Somalia, and the strengthening of the fishing industry as parts of a multi-pronged solution to piracy).

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impoverished and war-torn country,<sup>293</sup> calls for a complete and multilevel approach, one that must first include setting up a viable state in Somalia with naval capabilities. Recently, the Somali transitional government has urged the international community to help Somalia build up its own navy as a “final solution” to the problem of piracy.<sup>294</sup> Yet, even if the international efforts to patrol the Gulf of Aden and the Indian Ocean were effective, which some reports refute, such efforts present only a short-term solution.<sup>295</sup> Ultimately, the solution lies with the Somali state. Nevertheless, the idea that the solution lies entirely within the creation of a Somali navy is misguided. Somalia is a country that, at present, does not even have a viable military to support the transitional government. The country must instead rely on foreign troops for stability.

Currently, Somalia epitomizes the piracy problem,<sup>296</sup> but the problem is by no means limited to that region,<sup>297</sup> nor is it a new phenomenon.<sup>298</sup> For example, pirates operating off the Nigerian coast operate, in part, because of the political insurgency in the Niger Delta.<sup>299</sup> These rebels claim to have engaged in piracy to promote their political goals and to push the government toward equitable distribution of profits from the oil industry.<sup>300</sup>

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293. Katharine Houreld, *Somali Pirates Seize Chinese Ship with 25 Crew*, ABC NEWS, Oct. 19, 2009, <http://abcnews.go.com/International/wireStory?id=8861410>.

294. Zhang Haizhou, *Piracy Solution Is New Somali Navy, Says Ambassador*, CHINADAILY.COM.CN, Apr. 4, 2009, [http://chinadaily.com.cn/world/2009-04/24/content\\_7710730.htm](http://chinadaily.com.cn/world/2009-04/24/content_7710730.htm).

295. *See id.* (noting that some international warships are patrolling irresponsibly, which is encouraging pirates to attack more ships).

296. In its 2008 annual report, the IMO noted that the areas most affected by piracy were East Africa and the Far East, in particular the South China Sea, West Africa, South America and the Caribbean, and the Indian Ocean. IMO ANNUAL REPORT 2008, *supra* note 135, ¶ 5. Over the period under review, the number of acts reported to have occurred or to have been attempted increased from 67 to 72 in the South China Sea and from 60 to 134 in East Africa. *Id.* There was a decrease, over the 2007 figures, from 60 to 50 in West Africa, from 40 to 26 in the Indian Ocean, from 12 to 2 in the Malacca Strait, from 25 to 19 in South America and the Caribbean, and from 7 to 1 in the Arabian Sea. *Id.* This represented an annual increase of nearly 200 percent in the critical trade corridor linking the Suez Canal and the Indian Ocean. Report of the Secretary-General, *supra* note 108, ¶ 4.

297. *See* International Maritime Bureau, International Chamber of Commerce, *Unprecedented Rise in Piratical Attacks*, Oct. 24, 2008, [http://www.icc-ccs.org/index.php?option=com\\_content&view=article&id=306:unprecedented-rise-in-piratical-attacks&catid=60:news&Itemid=51](http://www.icc-ccs.org/index.php?option=com_content&view=article&id=306:unprecedented-rise-in-piratical-attacks&catid=60:news&Itemid=51) (“Somalia, Nigeria, and Indonesia remain[ed] international piracy hotspots, ranking first, second and third in acts of piracy up to the end of [the third quarter of] 2008.”).

298. In the 1990s, this piracy was concentrated in South Eastern Asia, which at the time was experiencing a deep economic crisis. Barrios, *supra* note 101, at 150.

299. Avast!, *supra* note 137, at 5.

300. *Id.* In *United States v. The Ambrose Light*, 25 F. 408 (S.D.N.Y. 1885), a U.S. District Court enforced piracy provisions against insurgents who were recognized to

## VI. RECOMMENDATIONS

Given how long and arduous a task it is to amend an international treaty, it would be easier to add a protocol to the UNCLOS that would provide both for the expansion of the jurisdiction of the ITLOS to include the prosecution of the crime of piracy and for the creation of regional courts where necessary. Ad hoc U.N. resolutions can be helpful in specific situations and as temporary solutions. In the long-term, however, it may well be necessary to adopt an additional protocol to the ITLOS that deals specifically with the problem of piracy as a means to enhance the jurisdiction of the tribunal over individual access to the court. Such expanded jurisdiction should also extend to cases where pirates are caught in territorial waters off the coastal state, and when the central authority of a particular state is dysfunctional or non-existent. Article 311, paragraph 3 of UNCLOS envisages such amendments. The UNCLOS could also be amended to expressly provide for situations where countries are either unwilling or unable to prosecute pirates.<sup>301</sup>

Enforcement measures should also address the possibility of cases brought “before the [t]ribunal . . . in the form of a complaint submitted by one State against another, accusing the defending State of not doing enough to combat piracy.”<sup>302</sup> On this point, because states are unlikely to sue each other, the United Nations can seek advisory opinions from the ITLOS regarding enforcement issues related to piracy.<sup>303</sup> Along similar lines, the President of the ITLOS has argued that “[a]s the international community faces new challenges in ocean activities, such as piracy and armed robbery, advisory proceedings before the Tribunal on legal questions concerning the application and interpretation of provisions of the Convention may prove to be a useful tool to States.”<sup>304</sup>

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have been fighting for political independence, though their actions were not carried out for private ends. *Id.* at 412–13.

301. Consider, for instance, the Straits of Malacca. The coastal states have “laws and effective governments[,] [as well as] the will to enforce the laws, but the hundreds of miles of coastline and numerous uninhabited islands make maritime law enforcement [prohibitively costly].” Bahar, *supra* note 2, at 20. Furthermore, navies—like the Indonesian Navy—are old and inefficient. *Id.*

302. Rüdiger Wolfrum, Former President, Int’l Tribunal for the Law of the Sea, Statement Given at the Übersee-Club, Hamburg: The Value for Hamburg of the Tribunal for the Law of the Sea—Profile, Expectations and Reality (Feb. 27, 2008), (transcript available at <http://www.itlos.org>).

303. Jesus, *supra* note 239, ¶¶ 8–9.

304. *Id.*

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Amendments to the 1958 Convention on the High Seas<sup>305</sup> have been proposed, but they were not adopted because it was felt at the time of the proposals that piracy was not a pressing problem.<sup>306</sup> Clearly, this is no longer the case. One possible step that could be taken could be the elaboration of an international code on piracy, which could then be incorporated into the domestic legislation of the states that are parties to the treaty. The lack of a comprehensive legislative framework has prevented some countries from adequately punishing pirates after they were convicted.<sup>307</sup> An international code could help to harmonize several important legal structures on an international level, including procedures for exercising jurisdiction during the investigation of reported instances of piracy, standards of punishment for pirates, and an extradition scheme for dealing with accused pirates.<sup>308</sup>

In order to counter piracy more expeditiously, the definition of piracy should be expanded to include violence that takes place in territorial waters.<sup>309</sup> This definition would enable states to engage in hot pursuit of pirates into the territorial waters of third states as long as the pursuing state respected that state's sovereignty by providing notice of pursuit to the coastal state.<sup>310</sup> Since the U.N. Security Council has demonstrated that it views piracy as a serious crime by designating it as a threat to international peace and security<sup>311</sup>—a designation also given to terrorism—it would not be a huge departure for the Council to extend the far-reaching geographical scope of antiterrorism rules so that they apply to the rules against

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305. Prior to the ratification of the Convention in 1958, a Committee of Experts for the Progressive Codification of International Law of the League of Nations also had proposed in Article 5 of the 1926 draft articles on the codification of piracy rules that “a pursuit commenced in the high seas may be continued even within the territorial waters unless the territorial State is in a position to continue such pursuit itself.” Jesus, *supra* note 109, at 386 (citations omitted).

306. *Id.*

307. Press Release, Int'l Maritime Org., Combating Piracy and Armed Robbery Against Ships—Call for International Code (May 13, 1999), <http://www.imo.org> (follow “Newsroom” hyperlink; then follow “Press Briefings” hyperlink; then follow “Archives—1999 Press Briefings” hyperlink).

308. *Id.*

309. See Dubner, *supra* note 133, at 33–34 (explaining that “most of the human rights violations and losses to commercial shipping occur . . . in territorial waters,” which escapes enforcement due to the coastal state's lack of desire to stop the acts, unless the definition is expanded).

310. *Id.* at 37–38.

311. See, e.g., S.C. Res. 1838, *supra* note 196. In Resolution 1844, the Council recognized “the role piracy may play in financing embargo violations by armed groups” and concluded that “the situation in Somalia continues to constitute a threat to international peace and security in the region.” S.C. Res. 1844, Preamble, U.N. Doc. S/RES/1844 (Nov. 20, 2008).

piracy. This change could be enacted without interfering with the sovereignty of the coastal state simply by amending the definition of piracy in the UNCLOS to include territorial waters.

Alternatively, instead of modifying the current definition of piracy, a different course of action could be used to formulate a whole new offense that would capture private acts at sea perpetrated for political or terrorist objectives—as was done for aircraft hijacking.<sup>312</sup> The advantages of formulating a new offense to fit the contemporary threat include a better description of the crime, a better description of the gravity of the offense, and a better tailored penalty. However, in international law, the process of adopting a new international agreement is an arduous task.<sup>313</sup> Modification of the UNCLOS is provided for under Article 311, which states that “[t]wo or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicably solely to the relations between them.”<sup>314</sup>

As many commentators have suggested, one of the greatest possible reforms would be for international rules on piracy to “extend the regime of piracy to territorial waters,” but in such a way that a coastal state’s sovereignty would continue to be respected.<sup>315</sup> The U.N. Security Council resolutions that permitted several international actors to enter Somalia’s territorial waters indicate that this is possible. Although the Council has broadened the powers of all nations patrolling the Gulf of Aden to pursue pirates and bring them to justice, there has so far been no activity in the courts.<sup>316</sup> To improve enforcement of the laws against piracy, the right of hot pursuit should extend to territorial waters and to the exclusive economic zone.

The limitation imposed by the hot pursuit rules that prevents the capture of suspected pirates should be modified in light of current communications technology. Now, it is possible for an ensnared vessel to inform the coastal state that it is under attack and that it is appealing to its national or flag state to exercise its jurisdiction and

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312. See Kavanagh, *supra* note 111, at 138 (explaining how the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft paved the way for the 1988 SUA Convention).

313. *Id.* at 137 n.52 (explaining that the delegates of the 1982 Convention on the Law of the Sea faced difficulties when they tried to agree “on an acceptable definition of piracy when there were in existence a variety of municipal legal traditions on the law of piracy”).

314. UNCLOS, *supra* note 18, art. 311, ¶ 3.

315. Jesus, *supra* note 109, at 382.

316. Douglas S. Malan, *Maritime Attorneys Deal with High Seas Piracy*, LAW.COM, Apr. 24, 2009, <http://www.law.com/jsp/law/sfb/lawArticleSFB.jsp?id=1202430155573>.

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protect it,<sup>317</sup> unless the Council later determines that the coastal state is willing and capable of acting on its own.

The lack of universal jurisdiction for acts of piracy committed in territorial waters is also particularly deserving of attention.<sup>318</sup> Capturing states or the ITLOS should be able to prosecute suspected pirates regardless of where the capture was accomplished, as long as there are reasonable grounds to believe that piracy was being or was about to be committed.<sup>319</sup> Some commentators have suggested that foreign warships should be allowed to continue their hot pursuit into territorial waters so that pirates cannot easily evade capture and prosecution simply because they have been able to enter the territorial waters of another country.<sup>320</sup> This should be the case even when the capture is not a result of hot pursuit. In order to protect the sovereignty of the coastal state, it would be necessary to communicate with the coastal state before engaging the suspected pirates. States should have the option to allow the coastal state to prosecute or extradite the suspected pirates captured in their territorial waters, subject to action by the U.N. Security Council in cases of noncompliance.

The alternative procedure under Article 313 of the UNCLOS, however, may be more appealing. Under Article 313, the U.N. Secretary General may circulate a proposed amendment to all state parties, without requiring a conference.<sup>321</sup> The only hurdle is that if a state party, within a period of twelve months from the date of that circulation, objects to the proposed amendment, the amendment is considered rejected.<sup>322</sup> Since the absence of any objection may very well be an unrealistic proposition, it is possible for two or more state

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317. See, e.g., *United States v. Conroy*, 589 F. 2d 1258, 1267–68 (1979) (upholding a U.S. Coast Guard enforcement action in the Haitian territorial sea with Haiti's consent).

318. *But see* Bahar, *supra* note 2, at 15 (arguing that “[u]niversal jurisdiction actually solves the problem of enforcement”). Bahar also notes that any hopes of closing the gap posed by a lack of international enforcement within territorial waters is “improbable” and that, in any case, it is “inadvisable” since the harmed state can seek redress through diplomatic and military channels. *Id.* at 16–17. This argument is based on respect for national sovereignty. *Id.* The argument, however, presumes that there is a functioning state with which another state can deal, and that national sovereignty is absolute, a presumption which, under the U.N. Charter, is incorrect in situations where international peace and security are threatened. Militarization of efforts to combat piracy would seem to undermine international law that aims to resolve disputes through peaceful means.

319. Jesus, *supra* note 109, at 386–87 (arguing for the implementation of an extradition and prosecution clause where alleged pirates escape into the territory of a country that cannot prosecute them).

320. *Id.* at 383–84.

321. UNCLOS, *supra* note 18, art. 313, ¶ 1.

322. *Id.* ¶ 2.

parties to agree on a bilateral or multilateral suspension or modification of the UNCLOS as long as they follow the conditions laid down by the UNCLOS, which states:

Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or performance of their obligations under this Convention.<sup>323</sup>

Instead of creating new regional organizations, especially in a resource-starved continent such as Africa, consideration should be given to linking regional cooperation for piracy suppression to existing regional arrangements such as the African Union.<sup>324</sup> This could be accomplished with the enactment of an agreement under the auspices of the African Union.<sup>325</sup> It is, after all, in the interest of the African Union to have safe waters surrounding its continent. The African Court of Justice could establish chambers to prosecute suspected pirates with complementary jurisdiction to domestic jurisdiction.<sup>326</sup> These efforts could very well allay fears that the ITLOS would be overwhelmed by piracy cases.

Regarding enforcement and regional cooperation, waiver of jurisdiction by the flag state should hinge solely upon its willingness or ability to exercise jurisdiction.<sup>327</sup> Thus, if the flag state fails to waive

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323. *Id.* art. 311, ¶ 3.

324. See Timothy H. Goodman, Note, "Leaving the Corsair's Name to Other Times": How to Enforce the Law of Sea Piracy in the 21st Century Through Regional International Agreements, 31 CASE W. RES. J. INT'L L. 139, 162-63 (1999) (listing the economic community of the West African states and the Preferential Trade Area as examples of African multilateral regional agreements).

325. The adoption of the African Maritime Transport Charter in 1994 under the auspices of the African Union is a positive development in the right direction demonstrating that African States are interested not only in taking an active part in maritime trade but also in protecting such trade as well. African Maritime Transport Charter, Dec. 15, 1993, available at [http://www.africa-union.org/root/au/Documents/Treaties/Text/AFRICAN\\_MARITIME\\_TRANSPORT.pdf](http://www.africa-union.org/root/au/Documents/Treaties/Text/AFRICAN_MARITIME_TRANSPORT.pdf). However, this Charter does not mention piracy.

326. The African Court of Justice and Human Rights is empowered to interpret and apply treaties adopted within the framework of the African Union. See Protocol on the Statute of the African Court of Justice and Human Rights, art. 28(b), Jul. 1, 2008, available at <http://www.africa-union.org/root/au/Documents/Treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf>.

327. See INT'L MARITIME ORG., PIRACY AND ARMED ROBBERY AGAINST SHIPS: RECOMMENDATIONS TO GOVERNMENTS FOR PREVENTING AND SUPPRESSING PIRACY AND

jurisdiction, either because it is unwilling or unable to do so, in certain cases the U.N. Security Council should be able to intervene and suspend such rights of the flag state without having to wait for that waiver.

The domestic courts must be equipped as necessary to ensure that they have the ability to adequately implement the relevant law. This should begin with accelerated stabilization of regions which have pirate-infested waters. Once such regions are stable, it would be possible to enact and enforce laws relating to pirates or to extradite pirates for prosecution elsewhere.

#### CONCLUSION

In sum, a review of the international law on piracy shows that the rules need to be updated to better combat crime on the high seas. Such updates should include the amendment of jurisdiction in Exclusive Economic Zones, territorial waters, and the archipelagic waters, and should not jeopardize the sovereignty of coastal states. Reform also requires the creation of a robust system of enforcement at the international level that is permanent and that measures up to the unique challenges of contemporary sea piracy. As in the case of the law of war, where hot pursuit is permitted, it should likewise be possible for a state to intrude into waters within the jurisdictional sovereignty of a coastal State as long as it has permission and can demonstrate sufficient cause for doing so.

Stand-alone strategies for dealing with piracy have been repeatedly undermined by other national and regional dynamics, which is why it is essential to look for broader approaches to the piracy problem. Turning to an international tribunal such as the ITLOS is one such approach. By expanding the definition of piracy and by extending the jurisdiction of the ITLOS to include piracy, the prosecution of suspected pirates should be made more feasible. Yet, even as significant normative and enforcement mechanisms are created, sufficient attention must be given to the root causes of piracy, which could likely be combated with the strengthening a country's central government and with the establishment of a secure and peaceful society.