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THE RESURGENCE OF PIRACY: A PHENOMENON OF MODERN TIMES

*Helmut Tuerk**

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SUMMARY

Maritime piracy has a very long history and was thought to have, more or less, become a matter of the past. Its resurgence, which threatens world trade and international security, is a phenomenon of modern times. This development is attributable to many factors, from the poverty of coastal populations and desire for financial gain, to the weakness of some states' policing functions, or even, as in the case of Somalia, the absence of an effective government and economic collapse, to the deficiencies of the legal environment characterized by both an insufficient legal framework and the lack of a response mechanism to counter piratical activities.

Under customary international law, there is no authoritative definition of piracy. Rather, the concept was first codified by the 1958 Geneva Convention on the High Seas and later by the 1982 United Nations Convention on the Law of the Sea (UNCLOS), although in a rather narrow manner, to include only acts committed for "private ends" on the high seas, and only those undertaken by one ship or aircraft against another ship or aircraft. Unlawful acts of violence directed against a ship, or against persons or property aboard, within a state's jurisdiction have been defined

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by the International Maritime Organization (IMO) as “armed robbery,” an offense to which universal jurisdiction, which permits any state to capture and punish pirates under its own municipal law, is not applicable. As Article 100 UNCLOS provides that “all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State,” the view seems justified that the suppression of piracy, aside from being a right, is also an international duty.

While piracy and terrorism at sea have many similarities, and though both are forms of violent interference with shipping, there is a marked difference between the goals of pirates and terrorists, to wit: while pirates usually seek financial gain, terrorists wish to make a “political or ideological” point, most often coupled with the wanton destruction of human life. Terrorism at sea was first dealt with by the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA), the scope of which was considerably expanded by an amending Protocol in 2005.

The IMO has for years endeavoured to design practical measures to deal with piracy and armed robbery against ships, as well as to draft relevant new international legal rules providing guidance to states and the shipping community. The enactment of further modern national anti-piracy legislation is certainly required as applying to pirates the SUA Convention, elaborated as an anti-terrorism instrument, seems to offer only a partial remedy.

In view of the recent upsurge of piracy off the coast of Somalia, the UN Security Council, as well as individual states, have been taking more robust action. The seizing states are, however, reluctant to prosecute and submit to criminal proceedings in their courts the pirates and armed robbers arrested in view of the attendant legal complexities, in particular, certain human rights implications. The question is also currently under discussion as to whether an international mechanism for the prosecution and punishment of suspected pirates should be established. What should not happen, in any case, is that pirates go free due to the lack of proper legislation or political will.

I. INTRODUCTION

The great oceans of the world – the Pacific, Atlantic, Indian and Arctic – constitute a single interconnected expanse; one continuous body of salt water that is the defining geographic feature of planet earth.¹ The oceans and their marginal seas have long been an indispensable arena for intercourse between human communities. Before there was air traffic and instantaneous communication, people, goods, and ideas travelled the world by ship. Today, even with advances in technology, seaborne commerce remains the linchpin of global economy. According to the International Maritime Organization (IMO), “more than 90 percent of global trade is carried by sea.”² There are two particularly critical chokepoints for maritime traffic: the Strait of Malacca, which is transited by around 50,000 vessels annually transporting about 50% of the total volume of oil transported by sea; and the Gulf of Aden, with about 22,000 vessels annually coming from or sailing to the Suez Canal, carrying more than 12% of that volume.³

Most of the oceans are under no state’s jurisdiction, which acts as both a barrier and a conduit for threats to the security of people everywhere,⁴ as piracy and armed robbery at sea have once again become a prominent maritime threat. Pirate attacks generally occur in four major geographical areas: the Gulf of Aden and off the coast of Somalia; the Gulf of Guinea, near Nigeria and the Niger River Delta; the Malacca Strait between Indonesia and Malaysia; and the Indian subcontinent, particularly between India and Sri Lanka.⁵

Since it began compiling relevant statistics in 1984, the IMO has shown that the total number of acts of piracy and armed robbery

¹ THE WHITE HOUSE, NATIONAL STRATEGY FOR MARITIME SECURITY 1 (Sept. 2005), available at http://www.dhs.gov/xlibrary/assets/HSPD13_MaritimeSecurityStrategy.pdf.

² Richard N. Hass, *Foreword* to SCOTT G. BORGERSON, COUNCIL ON FOREIGN RELATIONS, COUNCIL SPECIAL REPORT NO. 46, THE NATIONAL INTEREST AND THE LAW OF THE SEA vii (May 2009), available at http://www.cfr.org/content/publications/attachments/LawoftheSea_CSR46.pdf.

³ International Maritime Organization, *Piracy in Waters Off the Coast of Somalia*, http://www.imo.org/TCD/mainframe.asp?topic_id=1178 (last visited May 11, 2009).

⁴ See THE WHITE HOUSE, *supra* note 1, at 1.

⁵ Stephanie Hanson, *Combating Maritime Piracy*, COUNCIL ON FOREIGN RELATIONS, Apr. 13, 2009, http://www.cfr.org/publication/18376/combating_maritime_piracy.html (last visited Jan. 27, 2009).

against ships so far reported to the Organization was 4978 by April 30, 2009.⁶ It is, however, also believed that, in general, incidents of piracy and armed robbery at sea are considerably underreported.⁷ The actual number of such incidents could thus be even higher. The region off the coast of Somalia has now become the leading area plagued by pirate attacks, some taking place over 500 nautical miles off the coast.⁸ The International Chamber of Shipping, on April 15, 2009, therefore recommended that ships should, unless unavoidable, avoid planning a passage within 600 nautical miles of the Somali coast in the Indian Ocean.⁹

In 2008, maritime piracy reached its highest level since the Piracy Reporting Centre (PRC) of the International Maritime Bureau (IMB), a specialized division of the International Chamber of Commerce (ICC), began tracking piracy incidents in 1992.¹⁰ In that year, global piracy increased by 11% and piracy in East Africa up a stunning 200%,¹¹ with more than 120 attacks of piracy and armed robbery having taken place off the coast of Somalia.¹² For the first three months of 2009, the PRC has already listed 102 incidents of piracy and armed robbery, compared to 53 incidents in the first quarter of 2008 – an increase that is entirely due to intensified Somali

⁶ See Int'l Mar. Org. [IMO], Reports on Acts of Piracy and Armed Robbery Against Ships, Issued Monthly – Acts Reported During April 2009, ¶ 2, U.N. Doc. MSC.4/Circ.136 (May 5, 2009), available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25553/136.pdf. Additionally, the number of acts of piracy and armed robbery against ships reported to the IMO in 2008 was 306, as opposed to 282 incidents of piracy in 2007. See IMO Mar. Safety Comm. [MSC], 86th Sess. (May 27-June 5, 2009), MSC Meeting Summary, available at http://www.imo.org/About/mainframe.asp?topic_id=110&doc_id=10620 (last visited June 30, 2009) [hereinafter MSC 86th Session].

⁷ See *Piracy and Armed Robbery at Sea*, FOCUS ON IMO (Int'l Mar. Org.), Jan. 2000, at 2, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D7985/Piracy.2000.pdf.

⁸ IMO, *Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia*, ¶¶ 1-3, U.N. Doc. MSC.1/Circ.1302 (Apr. 16, 2009) available at http://www.maradot.gov/documents/MSC1_Circ1302.pdf.

⁹ *Id.*

¹⁰ Hanson, *supra* note 5; Niclas Dahlvang, *Thieves, Robbers & Terrorists: Piracy in the 21st Century*, 4 REGENT J. INT'L L. 17, 26 (2006).

¹¹ See Hanson, *supra* note 5.

¹² *Pirate of Somalia*, MAINBRACE, Jan. 2009 (No. 1), <http://www.blankrome.com/index.cfm?contentID=37&itemID=1816>.

pirate activity off the Gulf of Aden and the East-coast of Somalia.¹³ In fact, these two areas accounted for 61 pirate attacks, compared to 6 incidents for the same period in 2008.¹⁴ This surge in sea robbery is unprecedented and perhaps the most significant eruption of such criminal activity in 200 years, with the pirates making no discrimination among vessels.¹⁵ Many pirates seek to justify their actions as a response to illegal foreign fishing and the dumping of toxic waste in Somali waters,¹⁶ (i.e., the country's 200-nautical mile Exclusive Economic Zone).

Today's pirates constitute a serious threat not only for those at the front line (e.g., seafarers, fishermen and shipping companies), but also for the international community at large because of the repercussions they have on world trade and international security. Modern day piracy has been estimated to cost between \$13 and \$16 billion every year, a figure that could be substantially higher in the future.¹⁷ This resurgence of piracy and armed robbery against ships is attributable to many factors, including: the poverty of coastal populations and desire for financial gain; the weakness of some states' policing functions, or even (as in the case of Somalia) the absence of an effective government; economic collapse; and the deficiencies of the legal environment, characterized by both an insufficient legal

¹³ International Chamber of Commerce Commercial Crime Services, *Piracy Attacks Almost Doubled in 2009 First Quarter*, Apr. 21, 2009, available at http://www.icccs.org/index.php?option=com_content&view=article&id=350:piracy-attacks-almost-doubled-in-2009-first-quarter&catid=60:news&Itemid=51 (last visited June 5, 2009).

¹⁴ *Id.*

¹⁵ Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, 13 ASIL INSIGHTS (No. 2) 1, 1 (2009), available at <http://www.asil.org/insights090206.cfm>.

¹⁶ INTERNATIONAL EXPERT GROUP ON PIRACY OFF THE SOMALI COAST, PIRACY OFF THE SOMALI COAST: WORKSHOP COMMISSIONED BY THE SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL OF THE UN TO SOMALIA 12 (Nov. 21, 2008), available at http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf, at 27 [hereinafter "Somali Coast Workshop"]; see also Nicole Stracke & Marie Bos, GULF RESEARCH CENTER, PIRACY: MOTIVATION AND TACTICS: THE CASE OF SOMALI PIRACY 45 (Feb. 2009), available at http://kms1.isn.ethz.ch/serviceengine/Files/ISN/97641/ipublicationdocument_singledocument/FB07C80E-33FE-4BC5-89A2-80B9FC4406BD/en/2009-02_Piracy+Motivation+and+Tactics.pdf.

¹⁷ James Kraska & Brian Wilson, *Piracy Repression, Partnering and the Law*, 40 J. MAR. L. & COM. 43, 45 (2009).

framework and the lack of a response mechanism to counter piratical activities.¹⁸

II. HISTORY OF PIRACY

The concept of piracy has existed for thousands of years.¹⁹ “Early historians have suggested that acts of piracy can be traced back to the beginnings of navigation,” when piracy was “regarded only as one of the means of livelihood that the sea offered.”²⁰ Homer’s epic poems, the *Iliad* and the *Odyssey*, addressed the issue of piracy as early as the seventh or eighth century B.C.²¹ The most famous victims of this practice were the Greek philosopher Plato and the young Julius Caesar, both eventually freed against a ransom.²² The concept of piracy has, however, undergone an important evolution from that time until its codification in the twentieth century. In antiquity, almost anyone who attacked another on the open sea was referred to as a “pirate.”²³ The fundamental Greek and Roman conception of piracy distinguished between robbers, who were criminals under domestic law, and communities called “piratical.”²⁴ These were political societies pursuing an economic and political course which accepted the legitimacy of seizing the goods and persons of strangers without the religious and formal ceremonies considered a prerequisite for beginning a war.²⁵ It was believed that “pirate communities” were in a “permanent state of war” with

¹⁸ See Jose Luis Jesus, *Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT’L J. MAR. & COASTAL L. 363, 365 (2003); Stracke & Bos, *supra* note 16, at 16.

¹⁹ Joshua Michael Goodwin, *Universal Jurisdiction and the Pirate: Time for An Old Couple to Part*, 39 VAND. J. TRANSNAT’L L. 973, 976 (2006).

²⁰ *Id.* at 977.

²¹ Jason Power, *Maritime Terrorism: A New Challenge for National and International Security*, 10 BARRY L. REV. 111, 112 (2008); see also John D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 NAVAL L. REV. 73, 87 (2008).

²² See Kraska & Wilson, *supra* note 17, at 44; see also Goodwin, *supra* note 19, at 978.

²³ See Goodwin, *supra* note 19, at 978.

²⁴ See *id.* at 978-79.

²⁵ *Id.*

everyone around them²⁶ except those with whom they had concluded an alliance.

It was only in the late Middle Ages that the word “*piratae*” began to be understood as “sea thieves” while the old Greek and Roman usage of this term also seems to have survived in the Mediterranean Sea.²⁷ At about the same time, the legal status of war no longer applied to many lawful private takings.²⁸ It was, in fact, in an effort to avoid bringing about a state of war between princes that “letters of marque and reprisal” were issued to private persons authorizing them to recapture goods from foreigners that had been wrongfully taken by those foreigners, not necessarily the original goods, nor from the original taker, but from his fellow-citizens.²⁹

In the early seventeenth century, the Italian jurist Alberico Gentili, who taught at the University of Oxford, argued that only princes had the power to resort to war and that the label “pirate” unmistakably carried with it the connotation of outlawry, stating that “pirates are enemies of all men [*Piratae sunt hostes omnium*].”³⁰ The laws of war could not apply to them and their actions were forbidden by international law.³¹ In his view, any taking of foreign life or property at sea not authorized by a sovereign was synonymous with robbery on land.³² This concept was based on the writings of Cicero, who declared that “pirates were the common enemies of all communities.”³³ Cicero, however, used this phrase in a context different from that of Gentili and others who emulated him,³⁴ namely, with respect to politically significant communities in the

²⁶ *Id.* at 979.

²⁷ See ALFRED P. RUBIN, *THE LAW OF PIRACY* 19-20 (Transnat'l Publishers, 2nd ed. 2006).

²⁸ *See id.* at 31.

²⁹ *Id.*

³⁰ *See id.* at 28-29.

³¹ *See id.* at 29.

³² *Id.*

³³ Goodwin, *supra* note 19, at 989. The source of the paraphrase “*hostis humani generis*” has not been found, but has been attributed to Sir Edward Coke who used it in a book published in 1644. Rubin, *supra* note 27, at 17 n. 61. By 1615 British courts had determined “*pirata est hostis humani generis*.” Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 11 (2007).

³⁴ *See* Rubin, *supra* note 27, at 29.

Eastern Mediterranean who pursued a course of behaviour similar to that of the Vikings many centuries later.³⁵

The Dutch lawyer Hugo Grotius, in his seminal work *De Jure Belli ac Pacis*, published in its final version in 1646, defined the term "pirate" quite differently from Gentili and asserted that the term "piratical" should be applied to those who are banded together for wrongdoing, but not to societies formed for other reasons, even if also committing illegal acts.³⁶ According to Grotius, a gathering of pirates and brigands was not a state; members of a state, even if at times not free from crime, had been united for the enjoyment of rights, and served to render justice to foreigners.³⁷ Thus, Grotius's conception of the term "pirate" included robber bands on sea or land but not the Barbary States or other communities engaged in piratical activities whose primary purpose of association was considered lawful.³⁸

The growth of modern international law in the post-Westphalian order had to take account of the rapid increase of piracy, which was most prevalent in the Mediterranean Sea and on the trade routes between Europe and the Americas, reaching its heyday during the seventeenth and eighteenth centuries.³⁹ While piracy was cracked down on for disturbing "the commerce and friendship between different nations,"⁴⁰ privateering authorized by a sovereign was often openly encouraged and became the preferred method of plunder on the high seas.⁴¹ However, with trade flourishing in the relative calm after Napoleon's demise, nations began to increasingly view not only piracy, but also the activities of privateers as detrimental to their commercial and national interests.⁴² Therefore, to counter a menace that affected all nations indiscriminately and that could not be controlled by the normal means of diplomacy or warfare, the

³⁵ See Goodwin, *supra* note 19, at 978.

³⁶ See Rubin, *supra* note 27, at 37.

³⁷ *Id.*

³⁸ See *id.* at 39.

³⁹ I. Shearer, *Piracy*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1206&recno=2&author=Shearer%20%20Ivan (last visited November 6, 2009).

⁴⁰ See Goodwin, *supra* note 19, at 978.

⁴¹ *Id.* at 981.

⁴² See Bahar, *supra* note 33, at 12.

“Declaration Respecting Maritime Law” was signed in Paris in 1856, outlawing such state-sponsored piracy⁴³ in stating “privateering is, and remains, abolished.”⁴⁴

Piracy dwindled to a controllable and almost unnoticeable level at the end of the nineteenth century only to make a strong comeback, though in a different cast, in recent years. Indeed, at the turn of the nineteenth century and for the greater part of the twentieth, piracy seemed to have faded away into the mists of history.⁴⁵ Though a phenomenon as old as shipping and maritime trade, it was thought to have forever been eradicated from most of the seven seas.⁴⁶ The crime of piracy thus also began to disappear from some criminal codes or was altogether not included in the first place.⁴⁷ In the 1960s, however, piracy slowly started its resurgence and, by the 1980s, emerged once more as a regional, if not a global, menace. South-east Asia was initially at the forefront of this new phenomenon, only recently to be replaced by the region off the coast of Somalia as the “piracy hotspot of the world.”⁴⁸

The notion of piracy was first codified by the 1958 Geneva Convention on the High Seas⁴⁹ and later by the 1982 United Nations Convention on the Law of the Sea (UNCLOS)⁵⁰ in Articles 100 through 107 and 110, which almost literally repeat Articles 14 through 22 of the 1958 Convention. These provisions are based on the preparatory work of the International Law Commission (ILC), which was greatly assisted by the research carried out at the Harvard Law

⁴³ Bahar, *supra* note 33, at 12-13.

⁴⁴ Declaration Respecting Maritime Law, art. 1, Apr. 16, 1856, *available at* <http://www.icrc.org/IHL.nsf/INTRO/105?OpenDocument>.

⁴⁵ Jesus, *supra* note 18, at 364.

⁴⁶ *Id.*

⁴⁷ There are, for instance, no piracy offences in Somali law. Somali Coast Workshop, *supra* note 16, at 11. Spain deleted the offence from its Criminal Code in 1995 and France, as late as 2007. Paola Obelleiro, *Juristas internacionales debaten en A Coruña sobre la piratería*, EL PAIS, May 16, 2009 at 5.

⁴⁸ Stefan Eklöf, *Pirates in Paradise: A Modern History of Southeast Asia's Maritime Marauders*, 7 WMU J. OF MAR. AFF. 509, 509 (2008) (book review).

⁴⁹ Geneva Convention on the High Seas, April 29 1958, 450 U.N.T.S. 82.

⁵⁰ United Nations Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 397, 21 I.L.M. 1245 [hereinafter UNCLOS].

School, and which culminated in a draft Convention in 1932.⁵¹ Some countries that are not yet parties to UNCLOS are nevertheless bound by the 1958 Convention, which makes it so that the respective articles state the international law on piracy currently in force.⁵²

III. DEFINITION OF PIRACY

Under customary international law, there is no authoritative definition of piracy, and the municipal law of a number of countries is based on an extensive interpretation of that term, which has been defined as broadly as “any armed violence at sea which is not a lawful act of war.”⁵³ Many countries criminalize “piracy” that takes place in their own territorial waters which, however, is not piracy under international law.⁵⁴ Piracy was first authoritatively defined in the aforementioned Convention on the High Seas and later in UNCLOS, even though it was circumscribed by these legal instruments in a rather narrow manner. Article 15 of the 1958 Convention and Article 101 of UNCLOS define piracy as:

- (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 of such ship or aircraft;
 - (ii) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

⁵¹ See *Report of the International Law Commission to the General Assembly*, 11 U.N. GAOR Supp. (No. 9), U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. INT'L L. COMM'N 253, 282, U.N. Doc. A/CN.4/104/1956 [hereinafter Yearbook].

⁵² Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EUR. J. INT'L L. 399, 401 (2009).

⁵³ 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, 273 (1988) (citation omitted).

⁵⁴ Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1, 5 (2008).

- (b) Any act of voluntary participation in the operation of a ship or of an aircraft with the knowledge of facts making it a pirate ship or aircraft;
- (c) Any act of inciting or intentionally facilitating an act described in subparagraph (a) or (b).⁵⁵

When drafting this definition, the ILC considered certain controversial points as to the essential features of piracy. In doing so, it reached conclusions that the intention to rob (*animus furandi*) is not required; that acts of piracy may also be prompted by feelings of hatred or revenge and not merely by the desire for gain; and that the acts must be committed for private ends.⁵⁶ The Commission further concluded that piracy can only be committed by private ships and not by warships or other government ships, except when the crew has mutinied and taken control of the ship.⁵⁷ It also deemed that piracy can only be committed on the high seas or in a place outside the territorial jurisdiction of any state – such as an island constituting *terra nullius* – which is a rather remote possibility today.⁵⁸

The ILC also pointed out in the commentary that “[a]cts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy.”⁵⁹ The inclusion of aircraft within the definition went beyond earlier customary law.⁶⁰ The scope of this provision was further extended by the cited Conventions to include acts of violence from an aircraft to ships on the high seas.⁶¹

⁵⁵ Geneva Convention on the High Seas, *supra* note 49, art. 15; UNCLOS, *supra* note 50, art. 101.

⁵⁶ An attempt at the Third United Nations Conference on the Law of the Sea to have the words “for private ends” omitted “in order to include, within the definition . . . acts of violence or depredation committed for professed political ends” failed. CTR. FOR OCEANS LAW AND POLICY, UNIV. OF VA. SCH. OF LAW, 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 199 (Satya N. Nandan et al. eds., Martinus Nijhoff Publishers 1995) [hereinafter Virginia Commentary]; *see also* Johanna Hjalmarsson, *Piracy and International Law*, SHIPPING & TRADE LAW, Dec. 2008, at 1.

⁵⁷ Yearbook, *supra* note 51, at 282.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Shearer, *supra* note 39, at ¶ 15.

⁶¹ Yearbook, *supra* note 51, at 282.

The Commission, however, dismissed the idea that the sinking of merchant ships by submarines can be considered piratical acts – as had been expressed in the 1937 Nyon Agreement⁶² – because “to assimilate unlawful acts committed by warships to acts of piracy would be prejudicial to the interests of the international community.”⁶³ It should also be pointed out that the meaning of the word “illegal” in the definition of piracy is unclear and the legislative history is not enlightening. It is thus for the courts of the prosecuting state to decide whether the act of violence under consideration was illegal under international law or the national law of that state.⁶⁴

The definition of piracy as codified on the basis of the draft submitted by the ILC is thus quite limited, as it includes only acts committed for “private ends” on the high seas and only undertaken by one ship or aircraft against another ship. This excluded some earlier conceptions of piracy that allowed for the crime to be constituted by acts committed on board a vessel by passengers or crew – so-called “internal seizures.”⁶⁵ Such acts, even when consisting of holding the ship, its crew and the passengers for ransom as a follow-up to the seizure, are thus not covered.⁶⁶ The same holds true for violence in internal waters, the territorial sea or archipelagic waters. Furthermore, “the private-ends” criterion removes attacks on shipping “for the sole purpose of achieving some political end” from the concept of piracy under current international law.⁶⁷ Acts of violence and depredation exerted by environmentally-friendly groups or persons in connection with their quest for enhanced protection of the marine environment seem likewise to be excluded.⁶⁸ Additionally, in 1986, the Belgian Court of Cassation held that a Greenpeace vessel had committed piracy against an allegedly-

⁶² Shearer, *supra* note 39, at 2.

⁶³ Yearbook, *supra* note 51, at ¶ 15.

⁶⁴ Rüdiger Wolfrum, *Fighting Terrorism at Sea: Options and Limitations Under International Law*, in LEGAL CHALLENGES IN MARITIME SECURITY 8, 8 (Myron H. Nordquist et al. eds., 2008); see also Virginia Commentary, *supra* note 56, at 201; Akio Morita, *Piracy Jure Gentium Revisited: For Japan's Future Contribution*, 51 JAPANESE Y.B. INT'L L. 76, 78 (2008).

⁶⁵ Shearer, *supra* note 39, at ¶ 15.

⁶⁶ See Treves, *supra* note 52, at 402.

⁶⁷ Jesus, *supra* note 18, at 379.

⁶⁸ *Id.*

polluting Dutch vessel when attacking it because the act of violence was “in support of a personal point of view and not political.”⁶⁹

It has also been stated that the definition of piracy under UNCLOS might lead to a misunderstanding, as it refers to the high seas without mentioning the exclusive economic zone created by Part V of UNCLOS.⁷⁰ A proposal to expressly mention that zone in defining piracy was not accepted at the Third United Nations Conference on the Law of the Sea.⁷¹ This omission, however, does not mean that piracy under international law cannot be committed within that area; Article 58 (2) UNCLOS states that “[A]rticles 88 through 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this part,” which includes the articles relating to piracy. The exclusive economic zone also encompasses the contiguous zone by reason of the definition of the spatial extent of that zone, as defined in Article 55 UNCLOS.⁷² Piratical acts beyond the limits of the territorial sea are thus treated as though they had been committed on the high seas.

The effectiveness of the rules on piracy enshrined in UNCLOS has suffered from the fact that these are limited to the high seas and the exclusive economic zone. Pirates are thus able to evade pursuit by crossing into territorial waters, which constitutes a genuine problem.⁷³ The geographical limitation regarding the applicability of the rules on piracy has, to a certain extent, been aggravated by the fact that UNCLOS has granted the right to establish a territorial sea of twelve nautical miles instead of the previously-accepted limit of three nautical miles.⁷⁴ In past years, most attacks against ships, however, have taken place when transiting the territorial sea, when in port, or at anchor.⁷⁵ The IMB has therefore, for

⁶⁹ Shearer, *supra* note 39, at ¶ 16 (citation omitted).

⁷⁰ *See id.* at ¶ 19.

⁷¹ *See* Virginia Commentary, *supra* note 56, at 199.

⁷² *See* Shearer, *supra* note 39, at ¶ 19.

⁷³ Douglas Guilfoyle, *Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter Piracy Efforts*, 57 INT'L & COMP. L.Q. 690, 694 (2008).

⁷⁴ *Cf.* Rosemary Collins & Daud Hassan, *Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective*, 40 J. MAR. L. & COM., 89, 97 (2009).

⁷⁵ *See* Robert C. Beckman, *The 1988 SUA Convention and 2005 SUA Protocol: Tools to Combat Piracy, Armed Robbery and Maritime Terrorism*, in LLOYD'S MIU

statistical purposes, adopted a broader definition than the one retained by UNCLOS. Under the IMB definition, piracy and armed robbery at sea are “act[s] of boarding or attempting to board any ship with apparent intent to commit theft or any other crime with the intent or capability to use force in the furtherance of that act.”⁷⁶ This definition covers all acts of armed robbery against ships perpetrated in the territorial sea and archipelagic waters, as well as attacks against ships at anchor or berthed.⁷⁷

The IMO adopted the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, which defines “piracy” as “unlawful acts as set forth in [A]rticle 101 UNCLOS.”⁷⁸ Armed robbery is defined as “any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of ‘piracy,’ directed against a ship or against persons or property on board such a ship within a State’s jurisdiction over such offences.”⁷⁹ This clear distinction between piracy and “armed robbery against ships” also makes it evident that the special jurisdictional rules on piracy – universal jurisdiction – are not applicable to the latter.

Nevertheless, it has been noted that:

[T]he IMO’s definition of “armed robbery against ships” is not without ambiguity. It is called “armed robbery” even though it includes offences committed without weapons. Also, the phrase “within a state’s

HANDBOOK OF MARITIME SECURITY 188, 188 (Rupert Herbert-Burns, et al. eds., CRC Press 2009) [hereinafter *Tools to Combat Piracy*].

⁷⁶ Derek S. Johnson & Erika Pladdet, *Maritime Piracy in Asia*, 32 IIAS NEWSL. 45 (2003), http://www.iias.nl/nl/32/IAS_NL32_45.pdf.

⁷⁷ See 2007 ICC INT’L MAR. BUREAU ANN. REP, PIRACY AND ARMED ROBBERY AGAINST SHIPS, 3, available at <http://www.southchinasea.org/docs/ICC-IMB-PRC-2007.pdf>; see also John I. Winn & Kevin H. Govern, *Maritime Pirates, Sea Robbers, and Terrorists: New Approaches to Emerging Threats*, 2 HOMELAND SEC. REV. 131, 137 (2008).

⁷⁸ IMO, *Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships*, IMO Assemb. Res. A.922(22) (November 29, 2001), available at [http://www.imo.org/includes/blastDataOnly.asp/data_id%3D23528/A922\(22\).pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D23528/A922(22).pdf). The Maritime Safety Committee, in June 2009, agreed on amendments to the Code for consideration by the IMO Assembly later this year. MSC 86th Session, *supra* note 6.

⁷⁹ *Id.*

jurisdiction over such offences” is not entirely clear. It may be intended to be confined to ocean areas within a state’s territorial jurisdiction, such as ports, territorial sea, and archipelagic waters. However, as worded, it could include attacks on ships in internal waters, such as lakes or rivers, as well as attacks on ships on the high seas that do not fall within the narrow definition of piracy. Also it does not appear to include acts of robbery aboard ships that do not include violence or detention.⁸⁰

IV. UNIVERSAL JURISDICTION

Piracy is the oldest crime and one of only a few where universal jurisdiction has been generally recognized under customary international law independent upon specific requirements.⁸¹ The right to take enforcement measures against pirates is vested in all states; therefore, any of them has a right to capture and punish pirates under its own municipal law, even when the accused pirate is not a national of the state and the crime was neither committed against its nationals nor within its territorial waters.⁸² Universal jurisdiction over piracy was accepted because pirates indiscriminately attacked all states’ ships and constituted a threat to everyone.⁸³ It was theoretically justified by applying to them the concept of *hostis humani generis* – enemies of all mankind.⁸⁴ Furthermore, pirates were not subject to the authority of any state; no state could therefore be held responsible under international law for their acts.⁸⁵ The principle of universal jurisdiction is reflected in Article 105 UNCLOS, which provides that on the high seas, or in any place

⁸⁰ Robert C. Beckman, *Combatting Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward*, 33 OCEAN DEV. & INT’L L., 317, 319-20, (2002).

⁸¹ Halberstam, *supra* note 53, at 272.

⁸² *Id.* at 279.

⁸³ *Id.* at 288.

⁸⁴ *Id.*; see also Jesus, *supra* note 18, at 384; 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, 259 (2002).

⁸⁵ See Halberstam, *supra* note 53, at 288.

outside the jurisdiction of any state,⁸⁶ “every state has the right to seize the pirate ship, arrest the pirates, and seize the property on board.”⁸⁷ Such a provision functions “as an exception to the principle governing jurisdiction on the high seas, which provides that ships on the high seas are subject to the exclusive jurisdiction of the flag state.”⁸⁸

According to Article 107 UNCLOS, “a seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.”⁸⁹ The ILC has pointed out with respect to this provision that it “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.⁹⁰ This would not be considered a “seizure” within the meaning of that provision.⁹¹

The respective Article does not authorize the “seizure of a pirate ship or aircraft in territorial waters, archipelagic waters of an archipelagic State or internal waters, even for acts falling within the definition of piracy that have been committed on the high seas.”⁹² Despite several states’ support for a provision requiring “a State encountering a pirate ship or aircraft in the exclusive economic zone of another State to notify the coastal State and cooperate in taking appropriate measures,” the Third United Nations Conference on the Law of the Sea did not accept such recommendations.⁹³ If the seizure of a ship or aircraft on suspicion of piracy has been affected without adequate grounds, “the state making the seizure is liable to the state

⁸⁶ “In its commentary on article 39 of its 1956 draft articles, the International Law Commission stated that piracy ‘cannot be committed within the territory of a State or in its territorial sea’ as it is a “matter for the State affected to take the necessary measures for the repression of the acts committed within its territory.” Virginia Commentary, *supra* note 56, at 201.

⁸⁷ Tools to Combat Piracy, *supra* note 75, at 188.

⁸⁸ *Id.*; see also Virginia Commentary, *supra* note 56, at 213.

⁸⁹ UNCLOS, *supra* note 50, art. 107.

⁹⁰ Yearbook, *supra* note 51, at 283.

⁹¹ *Id.*

⁹² Virginia Commentary, *supra* note 56, at 215.

⁹³ *Id.* at 214.

of nationality of the ship or aircraft for any loss or damage caused by the seizure.”⁹⁴

The seizing state’s courts may decide on the penalties to be imposed and determine the action to be taken with regard to the seized vessel and property, subject to the rights of third parties acting in good faith.⁹⁵ The language of Article 105 may seem to indicate that the exercise of jurisdiction by the seizing state’s court is a possibility, not an obligation, notwithstanding the “duty” to cooperate in the repression of piracy laid down in Article 100. As the rule in Article 105 does not establish the exclusive jurisdiction of the seizing state’s courts, “[c]ourts of other states are not precluded from exercising jurisdiction under conditions which they establish.”⁹⁶ It has, however, also been asserted that the drafting history of this provision indicates that it was intended to preclude transfers of captured pirates to third states.⁹⁷ In any case, while international law permits action to be taken against pirates, it does not “ensur[e] that such action is effectively taken.”⁹⁸

The principle of universal criminal jurisdiction with respect to piracy is also reflected in Article 110 (1) UNCLOS regarding the right of visit of vessels on the high seas.⁹⁹ This provision generally “prohibits all acts of interference by warships regarding foreign ships on the high seas save for certain exceptions, one of which is that ‘the ship is engaged in piracy.’”¹⁰⁰ The warship, military aircraft or other duly authorized ship or aircraft may proceed to verify the ship’s right to fly its flag, and, if suspicion remains, continue with an examination aboard the ship.¹⁰¹ If the suspicion proves to be unfounded, then the ship is to be compensated for any loss or damage that it may have sustained.¹⁰² Furthermore, the right of “hot pursuit” may be exercised against a pirate ship or aircraft.¹⁰³ An unjustified stop or arrest out-

⁹⁴ UNCLOS, *supra* note 50, art. 106.

⁹⁵ *See* Shearer, *supra* note 39, at ¶ 18.

⁹⁶ Treves, *supra* note 52, at 402.

⁹⁷ Kontorovich, *supra* note 15, at ¶ 13 (construing Yearbook, *supra* note 51, at 283).

⁹⁸ Treves, *supra* note 52, at 402.

⁹⁹ Shearer, *supra* note 39, at ¶ 18.

¹⁰⁰ *Id.*

¹⁰¹ UNCLOS, *supra* note 50, art. 110(2).

¹⁰² *Id.* at art. 110(3).

¹⁰³ *Id.* at art. 111(1).

side the territorial sea is likewise subject to compensation for loss or damage.¹⁰⁴

It has been stated that the labelling of pirates as "*hostes humani generis*" is neither accurate nor can it provide a good reason to apply universal jurisdiction to piracy.¹⁰⁵ A pirate need not be truly the "enemy of all mankind" to be "found guilty of piracy and have universal jurisdiction applied."¹⁰⁶ Also, piracy is not seen as more heinous than a number of other serious crimes.¹⁰⁷ Applying universal jurisdiction to piracy has the potential to cause international tension, as it might be used merely to harass political opponents or for aims extraneous to criminal justice. Furthermore, the right of a pirate to due process is violated,¹⁰⁸ particularly because he cannot know in advance what acts will subject him to whose laws,¹⁰⁹ nor the possible punishments for piracy, which range from three years in prison to life imprisonment or even capital punishment.¹¹⁰

Despite these arguments, which do not seem without some merit regarding the right to due process, the principle of universal jurisdiction continues to be upheld by the international community. As a recent example, a U.S. Federal Court of Appeals held that a non-U.S. national who forcibly seized control of a non-U.S. vessel in international waters and who was later found in the United States could be prosecuted in the United States.¹¹¹ The court noted that universal jurisdiction is based upon the notion that "offenses against all states may be punished by any state where the offender is found [which] allows a state to claim jurisdiction over such an offender even if the offender's acts occurred outside its boundaries and even if the offender has no connection to the state."¹¹² The court further pointed out that "due process does not require a nexus between such an offender and the United States because the universal condemnation

¹⁰⁴ *Id.* at art. 111(8).

¹⁰⁵ Goodwin, *supra* note 19, at 994, 996.

¹⁰⁶ *Id.* at 994.

¹⁰⁷ *Id.* at 995-96.

¹⁰⁸ *Id.* at 1004.

¹⁰⁹ *Id.* at 1005.

¹¹⁰ *Id.* at 997, 998; *see also* Collins & Hassan, *supra* note 74, at 102; Dahlvang, *supra* note 10, at 39, 40.

¹¹¹ *United States v. Shi*, 525 F.3d 709, 723, 724 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 324 (U.S. Oct. 6, 2008) (No. 08-5942).

¹¹² *Id.* at 722-23.

of the offender's conduct puts him on notice that his acts will be prosecuted by any state where he is found."¹¹³

V. REPRESSION OF PIRACY

According to Article 100 UNCLOS, "[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."¹¹⁴ Questions have arisen as to whether UNCLOS regulates the seizure of pirates as a right or a duty and as to whether the parties to UNCLOS are obligated to adopt and implement anti-piracy legislation. The view seems justified that the suppression of piracy, besides being a right, is also an international duty.¹¹⁵ As the ILC pointed out in its commentary:

Any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law. Obviously, the State must be allowed a certain latitude as to the measures it should take to this end in any individual case.¹¹⁶

The question may further be asked: if states are obliged to establish jurisdiction at least to detain an alleged offender in the case of crimes against humanity, why not in cases of piracy?¹¹⁷

According to Article 102 UNCLOS, piracy may not only be committed by a private vessel or aircraft, but also by a government

¹¹³ *Id.* at 723 (citing *United States v. Martinez-Hidalgo*, 993 F. 2d 1052, 1056 (3d Cir. 1993)); *see also* Jorge Romero et al., *The Pirates of Puntland: Practical, Legal and Policy Issues in the Fight Against Somali Piracy*, NEWSSTAND: WHITE PAPERS (K&L Gates LLP, Wash., D.C.), March 2009, at 1, 5, *available at* <http://www.klgates.com/newsstand/search.aspx> (search keywords "Pirates of Puntland") [hereinafter *Pirates of Puntland*] ("Piracy is the oldest and one of the few crimes where this legal principle of universal jurisdiction has been generally recognized under customary international law.").

¹¹⁴ UNCLOS, *supra* note 50, art. 100.

¹¹⁵ Augustin Blanco-Bazán, *War Against Piracy?: Some Misconceptions and Oversights in the Repression of Crimes at Sea*, IL DIRITTO MARITTIMO, Jan.-Mar. 2009, at 266-67; *see also* Wolfrum, *supra* note 64, at 9.

¹¹⁶ Yearbook, *supra* note 51, at 282.

¹¹⁷ Blanco-Bazán, *supra* note 115, at 266.

ship or government aircraft whose crew has mutinied or taken control of the ship or aircraft.¹¹⁸ This provision is significant in that such a seized vessel is no longer considered to be engaging in the responsibility of the flag state and, therefore, may be apprehended at will.¹¹⁹ It would, however, be going too far to assimilate a government vessel to a pirate ship if the crew of the vessel has merely disobeyed orders or resorted to criminality, as this would ordinarily fall short of mutiny.¹²⁰ A ship is considered a pirate ship “if it is intended by the persons in dominant control to be used for the purpose of piracy”¹²¹ or has been used to commit such act, so long as it remains under the control of the persons guilty of that act.

The problem of preventing and repressing piracy and armed robbery against ships has been drawing increasing attention from the international community, particularly since the early 1990s. The IMO has played a leading role in providing guidance to states and the shipping community with respect to this phenomenon.¹²² In view of the increasing number of pirate attacks, the IMO adopted Resolution A.545(13) in 1983, which noted with great concern the increasing number of incidents involving piracy and armed robbery against ships and which recognized the grave danger to life and the grave navigational and environmental risks to which such incidents can give rise.¹²³ Governments concerned were urged to take as a matter of highest priority “all measures necessary to prevent and suppress acts of piracy and armed robbery from ships in or adjacent to their waters, including the strengthening of security measures.”¹²⁴ They were also

¹¹⁸ UNCLOS, *supra* note 50, art. 102.

¹¹⁹ Shearer, *supra* note 39, at ¶ 17.

¹²⁰ *Id.*

¹²¹ See Shearer, *supra* note 39, at ¶ 14(b).

¹²² Moritaka Hayashi, *Introductory Note to the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia*, 44 I.L.M. 826, 826 (2005); see also Dahlyang, *supra* note 10, at 35.

¹²³ IMO, *Measures to Prevent Acts of Piracy and Armed Robbery Against Ships*, IMO Assemb. Res. A.545(13) (Nov. 17, 1983), *reaff'd*, IMO Assemb. Res. A.783(18) (Nov. 4, 1993), *reaff'd*, IMO Assemb. Res. A.979(24) (Nov. 23, 2005), *reaff'd*, IMO Assemb. Res. A.1002(25) (Nov. 29, 2007), available at http://www.imo.org/Home.asp?topic_id=404 (follow “A.545(13)” hyperlink).

¹²⁴ *Id.* at ¶ 5, § 1.

invited to provide the IMO with details of any measures they had taken to combat acts of piracy and armed robbery.¹²⁵

In the following years, the IMO adopted further recommendations to governments regarding the prevention and suppression of piracy and armed robbery against ships. It also dealt with measures to prevent unlawful acts against passengers and crews on board ships and further gave guidance to shipowners and ship operators, shipmasters and crews.¹²⁶ The purpose of the aforementioned Code of Practice for Investigation of the Crimes of Piracy and Armed Robbery against Ships was to:

[P]rovide IMO Member States with an aide-memoire to facilitate the investigation of these crimes. The Code, which is recommendatory in nature, was adopted with full awareness of the fact that the fight against piracy and armed robbery against ships is often impeded in some countries by the absence of an effective legislative framework to facilitate not only the investigation of such crimes, but also the arrest and punishment of those accused of such acts. Consequently, one of the measures it recommends is for States to fill this legislative gap."¹²⁷

In 2005, the IMO adopted Resolution A.979(24),¹²⁸ which urged states to "adopt[] national legislation, as well as provid[e] enforcement vessels and equipment and guard[] against fraudulent ship registration."¹²⁹ States were specifically asked to take "legis-

¹²⁵ *Id.* at ¶ 5, § 3.

¹²⁶ See IMO, Maritime Safety Committee, *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*, IMO Doc. MSC/Circ.623/Rev.3 (May 29, 2002), available at http://www.imo.org/Circulars/mainframe.asp?topic_id=327&offset=462 (follow "MSC/Circ.623/REV.3" hyperlink).

¹²⁷ Rosalie Balkin, *The International Maritime Organization and Maritime Security*, 30 TUL. MAR. L.J. 1, 11 (2006).

¹²⁸ IMO, *Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia*, IMO Assemb. Res. A.979(24) (Nov. 23, 2005), *revoked*, IMO Assemb. Res. A.1002(25), ¶ 26, § 12 (Nov. 29, 2007), available at http://www.imo.org/Home.asp?topic_id=404 (follow "A.979(24)" hyperlink).

¹²⁹ *Id.* at ¶ 9, 24, § 7.4.

lative, judicial and law enforcement action to receive and prosecute or extradite pirates arrested by warships or other government vessels and to continue consultations by which technical assistance can be brought to regional states to enhance their capacity for repressing piracy.”¹³⁰ Addressing the problem of piracy off the coast of Somalia, in November 2007, the IMO adopted Resolution A.1002(25),¹³¹ in which it asked the Transitional Federal Government (TFG) of that country to:

[A]dvise the Security Council that it consents to warships or military aircraft, or other [government ships or aircraft], entering its territorial sea when engaging in operations against pirates or suspected pirates and armed robbers and of its readiness to conclude any necessary agreements to enable warships or military aircraft to escort ships employed by the [World Food Programme] for the delivery of humanitarian aid.¹³²

It seems obvious that “eradicating piracy calls for coordination among the international community and the close involvement of regional actors.”¹³³ An excellent example is found in the Strait of Malacca, one of “the world’s vital maritime passages,”¹³⁴ which, until 2005, was the main hotspot for piracy, and was even classified as a “war zone” for purposes of indemnity coverage.¹³⁵ In 2000, the

¹³⁰ Kraska & Wilson, *supra* note 17, at 50.

¹³¹ IMO, *Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia*, IMO Assemb. Res. A.1002(25) (Dec. 6, 2007), available at www.imo.org/includes/blastData.asp/doc_id=8754/1002.pdf.

¹³² IMO Press Briefing, *High-level meeting in Djibouti Adopts a Code of Conduct to Repress Acts of Piracy and Armed Robbery Against Ships* (Jan. 30, 2009), ¶ 20, http://www.imo.org/About/mainframe.asp?topic_id=1773&doc_id=10933 [hereinafter Code of Conduct].

¹³³ Commissioner Joe Borg, Address at the Seminar on Piracy and Armed Robbery Against Shipping: “Combating Piracy: Strength in Unity”: To Prevent, Deter, Protect and Fight Against an ACTUAL Threat 3 (Jan. 21, 2009) (transcript available at http://ec.europa.eu/transport/maritime/events/doc/2009_01_21_piracy/dr_borg_closing.pdf).

¹³⁴ *Id.*

¹³⁵ Winn & Govern, *supra* note 77, at 133.

Regional Conference on Combating Piracy and Armed Robbery against Ships was held in Tokyo, in which sixteen countries from South-East Asia and Hong Kong participated.¹³⁶ The Conference adopted two documents. The first was the Asia Anti-Piracy Challenges 2000, which was designed, *inter alia*, “to facilitate information exchange among coast guard agencies, as well as to cooperate in enhancing law enforcement activities within each country, intercepting or seizing ships suspected of piratical acts and providing immediate assistance to victimized ships and person.”¹³⁷ The second document was the Model Action Plan, which “set[] forth a series of specific actions to be taken by governments and the private sectors.”¹³⁸ These specific actions also included the reinforcement of self-protection measures by ships.¹³⁹

As a follow-up to these efforts, in November 2004, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)¹⁴⁰ was adopted with the purpose to “strengthen regional cooperation and coordination of all states affected within Asia to prevent and suppress effectively piracy and armed robbery against ships.”¹⁴¹ The central feature of the agreement is the establishment of an information sharing centre in Singapore, which also deals with information relating to individuals and transnational organized criminal groups.¹⁴² “The agreement further envisages a system of cooperation among states parties in detecting, arresting or seizing pirates and persons who have committed armed robbery, as well as in detecting the victim ships and rescuing victimized persons.”¹⁴³ The narrow scope of customary and codified law of the sea with respect to piracy is being expanded by “including armed robbery in the territorial sea, archipelagic waters and internal waters, and by including attacks directed ‘against a ship,’ implying that they are not limited to those ‘against another

¹³⁶ Hayashi, *supra* note 122, at 827.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia, Nov. 11, 2004, 44 I.L.M.829 (2005).

¹⁴¹ Hayashi, *supra* note 122, at 827.

¹⁴² *Id.*

¹⁴³ *Id.* at 828.

ship' as defined in UNCLOS Article 101."¹⁴⁴ This agreement (which entered into force September 4, 2006, and to which sixteen countries are parties¹⁴⁵) is a model worth considering for other regions vulnerable to piracy.¹⁴⁶ For example, the Malacca Strait has seen a "notable decline in attacks against shipping in recent years."¹⁴⁷ Through collaborative efforts, Indonesia, Malaysia, Singapore and Thailand have cut the number of pirate attacks by more than one-half since 2004.¹⁴⁸

In the aforementioned Resolution A.1002(25), the IMO also called upon regional states in East Africa to conclude an international agreement to prevent, deter and suppress piracy. The IMO further developed such a draft regional agreement that may be applied to any region, which presents an ideal model for states seeking to work more closely together.¹⁴⁹ Draft provisions include "procedures for states to conduct boarding and search of suspected vessels, and provisions for criminal enforcement and determining choice of jurisdiction among coastal and flag states."¹⁵⁰ As a result of these endeavours, a Code of Conduct to repress acts of piracy and armed robbery against ships was adopted in Djibouti on January 29, 2009.¹⁵¹ The Code is open for signature by the twenty-one countries in the region and has so far been signed by nine states.¹⁵² The Code provides for information sharing, interdicting ships suspected of engaging in acts

¹⁴⁴ *Id.*

¹⁴⁵ These countries are: Bangladesh, Brunei Darussalam, Cambodia, China, India, Indonesia, Japan, Korea, Laos, Malaysia, Myanmar, Philippines, Singapore, Sri Lanka, Thailand, and Vietnam. Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia, art. 18, Nov. 4, 2004, available at http://www.mofa.go.jp/Mofaj/gaiko/kaiyo/pdfs/kyotei_s.pdf.

¹⁴⁶ Borg, *supra* note 133, at 3.

¹⁴⁷ Guilfoyle, *supra* note 73, at 691 n.2.

¹⁴⁸ *Fighting Piracy on Land and at Sea: Hearing Before the Foreign Affairs Subcomm. on Int'l Orgs, Human Rights and Oversight*, 111th Cong. 2 (2009) (testimony of A. Costa), <http://www.unodc.org/unodc/en/about-unodc/speeches/2009-14-05.html>.

¹⁴⁹ IMO, *Piracy and Armed Robbery Against Ships: Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery Against Ships*, MSC/Circ. 622/Rev. 1, Annex, IMO Doc. MSC/Circ.622/Rev.1/Annex at 12 (June 16, 1999).

¹⁵⁰ Kraska & Wilson, *supra* note 17, at 54.

¹⁵¹ Code of Conduct, *supra* note 132, at ¶ 9.

¹⁵² These states are Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, the United Republic of Tanzania and Yemen. *Id.*

of piracy or armed robbery, and the apprehension and prosecution of suspects.¹⁵³ It also offers “possibilities of shared operations, such as nominating law enforcement or other authorized officials to embark in the patrol ships or aircraft of another signatory.”¹⁵⁴

In June 2009, the Maritime Safety Committee (MSC) of the IMO agreed on updated Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships; it also offered a guide to shipowners, ship operators, shipmasters and crew, including “a new annex aimed at seafarers, fishermen and other mariners who may be kidnapped or held hostage for ransom, based on the current United Nations guidance on ‘surviving as a hostage.’”¹⁵⁵ Furthermore, “[a]n MSC Circular on *Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia* was agreed, to include *Best Management Practices to Deter Piracy in the Gulf of Aden and off the Coast of Somalia*” as well as “additional guidance to vessels engaged in fishing, indentified as being particularly vulnerable to attack.”¹⁵⁶ The IMO Secretariat, at present,

intends to review existing national legislation to prevent and punish the crimes of piracy and armed robbery at sea as part of the Organization’s anti-piracy strategy, in response to UN Security Council Resolution 1851 (2008) which notes with concern the lack of capacity, domestic legislation, and clarity about how to deal with pirates following their capture. This problem has hindered more robust international action being taken against pirates off the

¹⁵³ *Id.* at ¶ 4.

¹⁵⁴ *See id.* at ¶ 5.

¹⁵⁵ MSC, *Revised Guidance on Combating Piracy Agreed by IMO Maritime Safety Committee*, MSC 86th Sess. (May 27 – June 5, 2009), http://www.imo.org/About/mainframe.asp?topic_id=1773&doc_id=11478.

¹⁵⁶ MSC 86th Session; The Secretariat, *Piracy and Armed Robbery Against Ships: Outcome of the Contact Group on Piracy off the Coast of Somalia, note to the Maritime Safety Committee*, MSC 86/INF. 13, (May 19, 2009), available at www.sjofartsverket.se/pages/20646/86-INF13.pdf; see also *Best Management Practices to Deter Piracy in the Gulf of Aden and off the Coast of Somalia*, (February 2009), available at <http://www.marisec.org/piracy-gulf-of-aden-indian-ocean-industry-best-management-practice>. These “Best Management Practices” were supported by a large number of industry representatives.

coast of Somalia and in some cases has led to pirates being released without facing justice.¹⁵⁷

The United Nations General Assembly and the Security Council have likewise repeatedly expressed concerns over the increasing threat to shipping from piracy and armed robbery at sea. The General Assembly, for instance, in Resolution 63/111, adopted in 2008, once again calls on states to cooperate in addressing threats to maritime safety and security, including piracy, through bilateral and multilateral instruments.¹⁵⁸ States are also being called upon to “take appropriate steps to facilitate the apprehension and prosecution of suspected pirates,” which in many cases will require the “ratification of the relevant international instruments[and will] . . . also urge[] States to adopt capacity-building and other measures and to work with the [IMO] with a view to actively combating piracy.”¹⁵⁹

VI. PIRACY AND TERRORISM

“While piracy and terrorism at sea have many similarities and both are forms of violent interference with shipping, there is a marked difference between the goals of pirates and terrorists: while pirates usually seek financial gain, terrorists wish to make a ‘political or ideological’ point, most often coupled with the wanton destruction of human life.”¹⁶⁰ Furthermore, “pirates act with stealth, while

¹⁵⁷ International Maritime Organization [IMO], Legal Committee, *Report of the Legal Committee on the Work of its Ninety-Fifth Session*, ¶ 9(c)(1), (30 March – 3 April 2009), available at http://www.imo.org/Newsroom/mainframe.asp?topic_id=280&doc_id=11167.

¹⁵⁸ G.A. Res. 63/111, U.N. Doc. A/RES/63/111 (Feb. 12, 2009), available at <http://daccess-ods.un.org/TMP/4366312.html>.

¹⁵⁹ Borg, *supra* note 133, at 2.

¹⁶⁰ Helmut Tuerk, *Combating Terrorism at Sea – The Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 15 U. MIAMI INT'L & COMP. L. REV. (SPECIAL ISSUE) 337, 342-43 (2008); LEGAL CHALLENGES IN MARITIME SECURITY 41 (M. Nordquist, R. Wolfrum, J.N. Moore, and R. Long eds., Martinus Nijhoff Publishers 2008) (2008); Leticia Diaz & Barry H. Dubner, *On the Problem of Utilizing Unilateral Action to Prevent Acts of Sea Piracy and Terrorism: A Protective Approach to the Evolution of International Law*, 32 SYRACUSE J. INT'L L. & COM. 1 (2004); Tammy Sittnick, *State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to take Additional Steps to Secure the Strait*, 14 PAC. RIM L. & POL'Y J. 743, 751 (2005).

terrorists seek publicity with their actions.”¹⁶¹ The view has also been expressed that “[t]o expand piracy to include terrorist acts would undermine the anti piracy regime, since the strategies to combat each crime are poles apart. The offences should continue to be treated separately”¹⁶² There is no authoritative definition of terrorism, but all definitions have several elements in common:

First, there must be actual or threatened violence. Second, a political motive is necessary. Finally, the acts must be directed at and intended to influence a targeted audience. The overall facet of these common elements is arguably that an act is not terrorism unless it possesses a deliberate political motive.¹⁶³

Terrorism was not officially condemned by the international community as a whole until 1985 when the United Nations General Assembly – in the wake of the hijacking of the Italian-flag cruise ship *Achille Lauro* – by consensus, adopted Resolution 40/61 “unequivocally condemn[ing] as criminal, all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardize friendly relations among States and their security.”¹⁶⁴ That hijacking led to a more profound examination of the legal relationship between piracy and maritime terrorism. It soon became clear that the “private-ends criterion” and the “two-vessel requirement,” as enshrined in the 1958 Convention on the High Seas and UNCLOS, made the rules of piracy inapplicable to the seizure of that cruise ship and there was thus “an obvious legal lacuna which had to be filled by creating a specific convention relating to maritime terrorism.”¹⁶⁵

¹⁶¹ Tuerk, *supra* note 160, at 343 (citation omitted).

¹⁶² See Collins & Hassan, *supra* note 74, at 100. The U.S. “*Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations* states that terrorist attacks on shipping ‘for the sole purpose of achieving some political end are arguably not piracy under current international law.’” Bahar, *supra* note 33, at 27 (citation omitted).

¹⁶³ Power, *supra* note 21, at 114, 115 (citations omitted).

¹⁶⁴ G.A. Res. 40/61, ¶ 15, U.N. Doc. A/Res/40/61 (Dec. 9 1985), available at <http://www.un.org/documents/ga/res/40/a40r061.htm>; Power, *supra* note 21, at 115.

¹⁶⁵ Tuerk, *supra* note 160, at 343, 344; Jesus, *supra* note 18, at 388; see also Carlo Tiribelli, *Time to Update the 1988 Rome Convention for the Suppression of*

As a consequence, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)¹⁶⁶ and a Protocol relating to Fixed Platforms on the Continental Shelf were adopted by consensus in 1988 on the basis of a proposal submitted by Austria, Italy and Egypt.¹⁶⁷ The SUA Convention – which entered into force in 1992 and at present counts 154 state parties¹⁶⁸ – is in substance based on previously existing anti-terrorism conventions by adapting their provisions to the maritime field.¹⁶⁹ “However, it is also a ‘genuine’ anti-terrorism convention because, in the Preamble, there is an expression of deep concern about ‘the world-wide escalation of acts of terrorism in all its forms, the occurrence of which is considered a matter of grave concern to the international community as a whole.’”¹⁷⁰ In drafting that Convention however, no attempt was made to define the term terrorism, as to have done so “would certainly have led to insurmountable political difficulties.”¹⁷¹

“The SUA Convention is applicable to ships on an international voyage operating or scheduled to operate seaward of any State’s territorial sea.”¹⁷² Despite the title of the Convention, its operative provisions “deal primarily with events after illegal acts have taken place; that is the apprehension, conviction and punishment of those who commit such acts, as opposed to the prevention or suppression of those acts.”¹⁷³ Only one provision – Article 13 – directly addresses the problem of prevention or suppression. This provision requires states party to cooperate in the prevention of the offences set forth in the Convention “by taking all practical measures to prevent preparations in their respective territories for [their]

Unlawful Acts Against the Safety of Maritime Navigation, 8 OR. REV. INT’L L. 133, 144 (2006).

¹⁶⁶ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1988, No. 29004, *available at* <http://www.unhcr.org/refworld/docid/3ae6b3664.html> [hereinafter SUA Convention].

¹⁶⁷ Tuerk, *supra* note 160, at 344.

¹⁶⁸ SUA Convention, *supra* note 166; *see also* Summary of Status of Convention, May 31, 2009, http://www.imo.org/TCD/mainframe.asp?topic_id=247.

¹⁶⁹ Tuerk, *supra* note 160, at 343-44.

¹⁷⁰ *Id.* at 347.

¹⁷¹ *Id.*

¹⁷² *Id.* at 348.

¹⁷³ *Id.* at 348-49.

commission within or outside their territories, as well as to exchange information and to coordinate measures to prevent the commission of those offences.”¹⁷⁴ Such offences include when a person unlawfully and intentionally:

- (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; . . . or (g) injures or kills any person, in connection with the commission or attempted commission of any of these offences.¹⁷⁵

The core provision of the SUA Convention, enshrined in Article 10, is the requirement for states “to extradite or prosecute.”¹⁷⁶ There is, however, no absolute obligation to extradite as the possibility of non-extradition for political offences, as well as the right to grant asylum, are maintained. Nor is there an absolute duty to punish because the state in whose territory the offender is found is only required “to submit the case without delay to its competent authorities for the purpose of prosecution,” which “shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.”¹⁷⁷ This provision, although corresponding to other anti-terrorism conventions, has been called a deficiency of the SUA Convention since it may allow terrorists to escape punishment.¹⁷⁸ “In support of the framework – *dedere aut iudicare* – requires states to establish their jurisdiction over specified

¹⁷⁴ *Id.*

¹⁷⁵ SUA Convention, *supra* note 166, art. 3.

¹⁷⁶ Brad Kieserman, *Preventing and Defeating Terrorism at Sea: Practical Considerations for the Implementation of the Draft Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)*, RECENT DEVELOPMENTS IN THE LAW OF THE SEA AND CHINA, 425, 425 (Myron Nordquist, et al, eds., 2005).

¹⁷⁷ UNCLOS, *supra* note 50, art. 10.

¹⁷⁸ Tullio Treves, *The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 2 SING. J. INT’L & COMP. L. (SPECIAL FEATURE) 541, 552 (1998) [hereinafter, Treves Convention].

offences and make these punishable by appropriate penalties which take into account their grave nature."¹⁷⁹

The events of September 11, 2001 have "exposed the vulnerability of the global transport infrastructure both as a potential target for terrorist activity and . . . a potential weapon of mass destruction."¹⁸⁰ Therefore, wide-ranging new security measures for international shipping were elaborated within the framework of IMO, which entered into force on July 1, 2004.¹⁸¹ Furthermore, in 2005, amending Protocols to the SUA Convention and Protocol were adopted, significantly expanding the scope of these instruments by providing for an international treaty framework for combating and prosecuting individuals who use a ship as a weapon or means of committing a terrorist attack, or transport by ship terrorists or cargo intended for use in connection with weapons of mass destruction programs.¹⁸² A mechanism was also devised for facilitating the boarding in international waters of vessels suspected of engaging in these activities.¹⁸³ Once these amendments are in force, "it will no longer be possible for a State to refuse an extradition request or one for mutual legal assistance on the grounds that the offense may be characterized as politically inspired or motivated."¹⁸⁴ The amendments, once again, provide no definition of terrorism, but instead contain a terrorist-purposes provision: an act is thus criminalised when its purpose, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act.¹⁸⁵

¹⁷⁹ Tuerk, *supra* note 160, at 350.

¹⁸⁰ Balkin, *supra* note 127, at 16.

¹⁸¹ Tiribelli, *supra* note 165, at 147-48. "The most far-reaching of these new measures is undoubtedly the International Ship and Port Facility Security Code (ISPS)" which contains detailed mandatory security requirements for governments, port authorities and shipping companies as well as a series of non-mandatory guidelines regarding the implementation of these requirements. Balkin, *supra* note 127, at 17.

¹⁸² SUA Convention, *supra* note 166.

¹⁸³ U.S. Dep't of State Fact Sheet, Protocols to the United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), available at <http://www.state.gov/t/isn/rls/fs/58322.htm>.

¹⁸⁴ Balkin, *supra* note 127, at 31.

¹⁸⁵ International Convention for the Suppression of the Financing of Terrorism, Dec. 19, 1999, 2178 U.N.T.S. 38349 ("Any . . . act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the

The SUA Convention drafters undoubtedly departed from the premise that piracy was a crime already legislated in an international treaty, namely UNCLOS. They certainly did not take into account that so many states party to UNCLOS would see no need to enact appropriate anti-piracy legislation in compliance with that framework Convention.¹⁸⁶ In view of the lack of such legislation in many countries, it has been suggested that the SUA Convention could also be used to detain pirates, as the motive of the person committing any of the offenses listed therein was not relevant.¹⁸⁷

At the SUA Convention, the Special Representative of the UN Secretary-General had already pointed out that although the rules on piracy were inapplicable to maritime terrorism, it would seem that acts of piracy or armed robbery at sea could qualify as unlawful acts under the Convention, as long as they met the definition of the offences set forth therein.¹⁸⁸ In the same vein, the Security Council, in Resolution 1846,¹⁸⁹ for the first time established a link between the SUA Convention and piracy by “creat[ing] criminal offenses to establish jurisdiction and accept delivery of persons . . . responsible for or suspected of seizing a vessel or . . . unlawfully and intentionally seiz[ing] or exercis[ing] ‘control over a ship by force or threat thereof or any other form of intimidation.’”¹⁹⁰ Furthermore, states party to the Convention are urged to fully implement their respective obligations and “cooperate with the Secretary-General and the IMO to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.”¹⁹¹

hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”).

¹⁸⁶ See Blanco-Bazán, *supra* note 115, at 265.

¹⁸⁷ See Tools to Combat Piracy, *supra* note 75, at 192; see also Collins & Hassan, *supra* note 74, at 106.

¹⁸⁸ N.D. Korolyova, *International Legal Issues of Cooperation Between States in Suppressing Piracy and Terrorism: Some Aspects*, MOSCOW SYMPOSIUM ON THE LAW OF THE SEA 174, 177 (Thomas A. Clingan, Jr. & Anatoly L. Kolodkin eds., 1991); see also Treves Convention, *supra* note 178, at 544; Virginia Commentary, *supra* note 56, at 185.

¹⁸⁹ S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

¹⁹⁰ Kraska & Wilson, *supra* note 17, at 56; S.C. Res. 1846, *supra* note 189, at ¶ 15.

¹⁹¹ S.C. Res. 1846, *supra* note 189, at ¶ 15.

It has been stated that applying the SUA Convention to piracy may help in some situations, but that this remained a defective remedy because it did not reflect the clear distinctions between piracy and maritime terrorism established by the drafters of the two basic treaties addressing crimes at sea.¹⁹² Although piracy legislation in some states does not acknowledge these distinctions (as many states party to UNCLOS have not yet updated their outdated nineteenth century provisions) it is clear from those that do that the use of the SUA Convention for suppressing piracy does not reflect sound legal policy.¹⁹³ It has thus been suggested that states ought to modernize their piracy legislation in accordance with UNCLOS, which should include “the obligation to exert jurisdiction not only in connection with piracy incidents against the country’s own ships, but also in connection with ships flying the flag of other countries affected by piracy.”¹⁹⁴ Once uniform piracy legislation is in place worldwide, clear distinctions could be established between piracy as a crime subject to universal jurisdiction on the one hand, and unlawful acts under the SUA Convention on the other, to be counteracted not through universal, but through multiple jurisdiction.¹⁹⁵

VII. CURRENT PROBLEMS

The steadily increasing danger for navigation in the Gulf of Aden and off the coast of Somalia, as well as the outrage caused by pirate attacks on ships carrying humanitarian supplies to the Somali population, have been decisive in prompting the international community into action in that region. In 2008, the United Nations Security Council passed several resolutions dealing with Somali piracy, each of which was “pursuant to Chapter VII of the United Nations Charter, under which the Council may authorize the use of military force against threats to international security.”¹⁹⁶ These resolutions aim at remedying the limitations of the rules of current international law with respect to piracy – as far as their application to the situation in Somalia is concerned¹⁹⁷ – and also provide a legal

¹⁹² Blanco-Bazán, *supra* note 115, at 265-66.

¹⁹³ *See id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *See* Kontorovich, *supra* note 15, at ¶ 5.

¹⁹⁷ Treves, *supra* note 52, at 402.

basis for interception operations by the warships of a large number of countries, including the United States, several European Union Member States, China, India, Japan and Russia, patrolling the waters of the Gulf of Aden and the coast of Somalia.

Since December 2008, the European Union has been conducting a military operation, Operation Atalanta, in support of the relevant Security Council Resolutions – the first EU maritime operation conducted in accordance with the European Security and Defence Policy.¹⁹⁸ The duration of this mission has been extended until at least the end of 2010.¹⁹⁹ NATO, after having instigated two short-term missions against piracy off the Somali coast, on June 12, 2009, decided to launch operation Ocean Shield, which is anticipated to run for an analogous period of time.²⁰⁰ These international efforts have been hampered by the fact that the naval forces have to answer to individual national authorities with varied rules of engagement, as well as by incompatible communications.²⁰¹

The Security Council in Resolution 1816, adopted on June 2, 2008, expressed its grave concern at “the threat that acts of piracy and armed robbery against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, the safety of commercial maritime routes and to international navigation.”²⁰² It also determined that “the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia, which continues to constitute a threat to international peace and security in the region.”²⁰³ As aptly noted by one scholar, “[i]t is important to observe that it is the situation in Somalia which constitutes the threat to inter-

¹⁹⁸ Pirates of Puntland, *supra* note 113, at 4; Council Joint Action 2208/749/CFSP, 2008 O.J. (L 252) 39; Council Joint Action 2008/851/CFSP, 2008 O.J. (L 301) 34.

¹⁹⁹ Europa.eu, Council Extends Atalanta Operations, http://ec.europa.eu/delegations/ukraine/press_corner/all_news/news/20090616_01_en.htm.

²⁰⁰ *NATO Extends Anti-Piracy Mission*, France 24, June 12, 2009, available at <http://www.france24.com/> (search “NATO Extends Anti-Piracy Mission”; then follow “NATO Extends Anti-Piracy Mission” hyperlink under the results tab).

²⁰¹ See Statement, Seoul High-Level Meeting on Piracy off the Coast of Somalia (June 10, 2009), available at [http://www.korea.net/News/news/newsView.asp?serial_no=20090622002&part=101&SearchDay=\[hereinafter Statement\]](http://www.korea.net/News/news/newsView.asp?serial_no=20090622002&part=101&SearchDay=[hereinafter Statement]).

²⁰² S.C. Res. 1816, ¶ 2, U.N. Doc. S/RES/1816 (June 2, 2008).

²⁰³ *Id.* at ¶ 8.

national peace and security, not the piracy and armed robbery as such.”²⁰⁴

In the Gulf of Aden, where international shipping must pass through a narrow corridor, pirates are able to launch attacks in international waters and then quickly return to Somali territorial waters. The Security Council, with the express consent of the TFG of Somalia, authorized states cooperating with that Government “in the fight against piracy and armed robbery at sea off the coast of Somalia” to enter the territorial waters of Somalia for that purpose “in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law” and to use, under the same conditions, “all necessary means to repress acts of piracy and armed robbery.”²⁰⁵ The authorization given by Resolution 1816, originally limited to a period of six months, has been renewed for a period of twelve more by Resolution 1846 of December 2, 2008.²⁰⁶

The basic effect of these provisions of Resolution 1816 is to “make the rules of international law concerning piracy on the high seas applicable also to territorial waters, *inter alia*, permitting pursuit from the high seas into these waters,”²⁰⁷ and to “counter violence against or aboard vessels occurring exclusively within Somalia’s territorial sea.”²⁰⁸ These provisions also clarify that states acting under these rules within the territorial waters of Somalia may use “‘all necessary means’ – commonly associated with a general authorization to use military force.”²⁰⁹ It has correctly been stated that international law has “little to say about the *manner* in which piracy may be suppressed.”²¹⁰ Self-defence against armed attack or threat thereof seems to be a guiding principle of states, the navies of which are engaged in these anti-piracy efforts. Action against pirates can be “assimilated to the exercise of the power to engage in police action on the high seas” with respect to foreign vessels in accordance with international legal rules.²¹¹ It would, however, seem that in any

²⁰⁴ See Guilfoyle, *supra* note 73, at 695.

²⁰⁵ S.C. Res. 1816, *supra* 202, art. 7.

²⁰⁶ S.C. Res. 1846, *supra* note 189.

²⁰⁷ Treves, *supra* note 52, at 404.

²⁰⁸ Guilfoyle, *supra* note 73, at 695.

²⁰⁹ *Id.*

²¹⁰ *Id.* (emphasis in the original).

²¹¹ Treves, *supra* note 52, at 413; *see also* Blanco-Bazán, *supra* note 115, at 267.

case the use of force must be necessary, proportionate and should be preceded by warning shots where practicable. As the International Tribunal for the Law of the Sea has emphasized in a case before it, “considerations of humanity must apply in the law of the sea, as they do in other areas of international law.”²¹²

Furthermore, on December 16, 2008, the Security Council passed Resolution 1851,²¹³ extending the authorization of military force to land-based operations on the mainland of Somalia, as that Resolution authorizes nations for a one-year period to “undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea.”²¹⁴ The Resolution also invites “all States . . . fighting piracy off the coast of Somalia to conclude special agreements . . . with countries willing to take custody of pirates in order to embark law enforcement officials (‘shipriders’) from the latter countries, in particular countries from the region, to facilitate the investigation and prosecution of piracy suspects.”²¹⁵ The exercise of third state jurisdiction by shipriders in Somali territorial waters is, however, subject to the advance consent of the TFG and such agreements or arrangements must not prejudice the effective implementation of the SUA Convention.²¹⁶ Additionally, “[w]here a shiprider arrangement is in place, transfers of suspects from sea to shore is straightforward: they remain subject to the jurisdiction of the shiprider’s government throughout.”²¹⁷ Shipriders have already been used to great effect against drug smugglers in the Caribbean.²¹⁸

²¹² *M/V Saiga (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of July 1, 1999, in *International Tribunal for the Law of the Sea, Reports of Judgments, Advisory Opinions and Orders, 1999, Vol. 3* (The Hague, Boston, London: Kluwer Law International, 1999), available at http://www.itlos.org/start2_en.html (select “Judgment of 1 July 1999”).

²¹³ S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2009).

²¹⁴ *Id.* at art. 6.

²¹⁵ *Id.* at art. 3.

²¹⁶ *See id.*

²¹⁷ Somali Coast Workshop, *supra* note 16, § 2.3.

²¹⁸ *Costa*, *supra* note 148, at 2. The Maritime Safety Committee agreed that the use of unarmed security personnel is a matter for individual shipowners, companies, and ship operators to decide. The carriage of armed security personnel, or the use of military or law-enforcement officials (duly authorized by the Government of the flag state to carry firearms for the security of the ship) should be subject to flag State legislation and policies and is a matter for the flag State to authorize, in consultation

Authorizing armed action against pirates in sovereign territory is certainly an unprecedented measure by the Security Council. "Because the Resolutions permit responses beyond those permitted under customary international law they caused some apprehension on the part of states with a history of piracy problems, fearing the resolutions may set a precedent eroding national territorial sovereignty."²¹⁹ It has, however, rightly been pointed out that there are important limitations to the authorization accorded by the Security Council which make the relevant provisions less revolutionary than they might appear. First, as already mentioned, the authorization is limited *ratione temporis*.²²⁰ Second, its scope is clearly limited *ratione loci* as the authorization provided "applies only with respect to the situation in Somalia."²²¹ Third, cooperating states are requested to ensure that anti-piracy activities they undertake "do not have the practical effect of denying or impairing the right of innocent passage to the ships of any third State."²²² Fourth, it is affirmed that the authorization provided "shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations" under UNCLOS, with respect to any other situation.²²³ It is also underscored in particular that the authorization by the Security Council "shall not be considered as establishing customary international law."²²⁴ The point that the integrity of UNCLOS must be maintained was made by several members of the Council when Resolution 1816 was adopted and was likely a precondition for its unanimous acceptance.²²⁵

with shipowners, companies and ship operators. The Maritime Safety Committee further expressed the view that flag States should strongly discourage the carrying and use of firearms by seafarers for personal protection or for the protection of a ship. Carriage of firearms may pose an even greater danger if the ship is carrying flammable cargo or similar types of dangerous goods. See MSC 86th Session, *supra* note 6.

²¹⁹ See Kontorovich, *supra* note 15, at ¶ 7.

²²⁰ Treves, *supra* note 52, at 404-05 (quoting S.C. Res. 1816, *supra* note 202, ¶ 9; S.C. Res. 1846, *supra* note 189, at ¶ 11).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 406.

It must be emphasized that these Security Council Resolutions were adopted on the basis of consent given by the TFG of Somalia - pursuant to the aforementioned request by the IMO - which sought and welcomed these measures because it lacks the capacity to interdict pirates or patrol and secure its territorial waters.²²⁶ The reference to the consent by the coastal state concerned greatly limits the "revolutionary content" of the resolutions, as the activities authorized could also be conducted in the absence of any Security Council Resolution on the basis of an agreement given by the coastal state.²²⁷ It is further to be noted that Resolution 1851 requires that any measure undertaken in Somali territory must be consistent with applicable international humanitarian and human rights law.²²⁸ The latter condition may greatly limit the scope of possible anti-piracy operations under the Resolution because, under international humanitarian law, civilians may not be specifically targeted except in immediate self-defence,²²⁹ and pirates are, when not combative, considered to be civilians.²³⁰ United States military officials have already warned that any action against pirates on land would likely result in civilian deaths. "Still, Resolution 1851 clearly broadens the scope of permissible 'hot pursuit,' allowing pirates to be chased from the high seas into Somali waters and farther onto dry land."²³¹

As previously pointed out, international law recognizes universal jurisdiction in the case of piracy which, under the aforementioned Security Council Resolutions, also applies to seizures and arrests in the territorial sea of Somalia. "The seizing states . . . are, however, reluctant to exercise such broad powers by prosecuting and submitting to criminal proceedings in their courts the pirates and armed robbers arrested" in light of legal complexities and, particularly, the human rights implications.²³² Thus, in a number of instances, pirates have been let free or not been detained in the first place.

²²⁶ See Kontorovich, *supra* note 15, at ¶ 7.

²²⁷ *Id.*

²²⁸ S.C. Res. 1851, *supra* note 213, art. 6.

²²⁹ Treves, *supra* note 52, at 412.

²³⁰ See *id.*; Bahar, *supra* note 33, at 6.

²³¹ See Kontorovich, *supra* note 15, at ¶ 8; see also Kraska & Wilson, *supra* note 17, at 57.

²³² See Treves, *supra* note 52, at 408.

Member States of the European Convention on Human Rights²³³ are obviously concerned that pirates might request asylum in the respective countries, as they certainly would claim to risk torture or the death penalty if returned to Somalia.²³⁴ Furthermore, after pirates had served a sentence and been granted asylum, they may also ask for a family reunion; though no country would be eager to have to import pirate clans. The question may further arise whether the requirement under the European Convention on Human Rights of bringing an arrested or detained person promptly before a judge can be met in the case of a prolonged detention of a pirate suspect on a naval vessel.²³⁵

Ideally, suspects should be tried in the country where they originated, but in the case of Somalia this does not – at least under present circumstances – seem to be a realistic option. Flag states could, of course, prosecute the pirates, but in many cases ships in the region fly flags of convenience of far away countries. Another commonly employed option is to conclude bilateral agreements with a country in the region defining procedures for the detention, transfer and prosecution of persons suspected of having committed acts of piracy, as the United States and the European Union have done with Kenya.²³⁶ The latter agreement expressly provides that such transfer

²³³ See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, *inter alia* amended by Protocol No. 11, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> (last visited June 29, 2009) [hereinafter Convention for the Protection of Human Rights].

²³⁴ *Id.* at art. 3 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”); see also The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 3(1) available at <http://untreaty.un.org/english/treatyevent2001/pdf/07e.pdf> (“No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”).

²³⁵ Convention for the Protection of Human Rights, *supra* note 233, art. 5(3) (“Everyone arrested or detained in accordance with the provisions . . . of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial”; *id.* at art. 6(1) (“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”).

²³⁶ See Costa, *supra* note 148, at 2.

may only take place on condition of humane treatment and that no one will be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment or punishment.²³⁷ There is further a guarantee that any transferred person will be brought promptly before a judge and is entitled to trial within a reasonable time or to release.²³⁸ It remains to be seen whether the Kenyan justice system will, in the long run, really be willing and able to cope with a major influx of suspected pirates. That country certainly does not wish to become a 'dumping ground' for piracy suspects from the entire region.²³⁹

The question is currently under discussion whether part of the legal response of the international community to piracy should be the establishment of an international piracy court or tribunal. Several suggestions have been made in this respect, such as the creation of an entirely new international tribunal on the basis of a Security Council Resolution following the pattern of the international criminal tribunals for the former Yugoslavia and Rwanda; the establishment of an African regional anti-piracy court in the same manner; the creation of a hybrid tribunal following the model of the Special Court for Sierra Leone; or amending the statutes of the International Tribunal for the Law of the Sea or the International Criminal Court in the Hague by an international treaty.²⁴⁰

As regards the International Tribunal for the Law of the Sea, it should be borne in mind that, at present, it could deal with piracy issues only insofar far as they relate to disputes between states, or if a legal question would be submitted to it on which it might render an

²³⁷ See "Exchange of Letters" between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, March 6, 2009, Annex, provisions, 2009 O.J. (L 79) 51, ¶¶ 3(a) & 4.

²³⁸ *Id.* at ¶¶ 3(b) & (c).

²³⁹ See Treves, *supra* note 52, at 411.

²⁴⁰ See UN, Contact Group on Piracy Off the Coast of Somalia: Working Group on Legal Issues, Discussion Paper on Prosecution of Pirates: An International Mechanism?, Copenhagen, March 3, 2009 (on file with author) at 2-3 [hereinafter Contact Group].

advisory opinion.²⁴¹ With respect to the International Criminal Court, it has been pointed out that it has been established to prosecute individuals for crimes of a much more serious nature than piracy, i.e., genocide, crimes against humanity, war crimes and the crime of aggression.²⁴² That Court would, therefore, not be suitable for dealing with common criminals like pirates in cases where national tribunals are unwilling or unable to prosecute them.

Amending the statutes of existing tribunals on a treaty basis would undoubtedly require a number of years and thus would not constitute a short or medium term remedy for the present situation in Somalia. The question may be asked whether such an enlargement of competence could also be effected by way of a Security Council Resolution. The view has also been put forth that international tribunals, besides being expensive to operate, are not at all appropriate for dealing with a crime like piracy – a common crime that has existed for centuries – which is subject to universal jurisdiction and has been successfully prosecuted in national courts.²⁴³

In connection with the suggestion to establish an international tribunal, it must also be borne in mind that such tribunals lack long-term prison facilities, and since states have little desire to house convicted international criminals, they necessarily depend on state cooperation for the enforcement of sentences.²⁴⁴ They also must find third states for the safe relocation of witnesses and acquitted

²⁴¹ See Helmut Tuerk, *The Contribution of the International Tribunal for the Law of the Sea to International Law*, 26 PENN ST. INT'L L. REV. 289 (2007) (“[UNCLOS] does not contain any provision conferring advisory jurisdiction on the Tribunal as such, which may, however, on the basis of Article 21 of its Statute give an advisory opinion on a legal question if that is provided for by an international agreement related to the purposes of the Convention conferring jurisdiction on it. Thus far, no use has been made of that interesting option in any international instrument.”); see also Press Release, International Tribunal for the Law of the Sea, Clarification (April 24, 2009) (setting forth that the tribunal “deals mainly with disputes between States parties to the Convention; it is not a criminal court and has no competence to try pirates.”), available at http://www.itlos.org/news/press_release/2009/press_release_135_en.pdf.

²⁴² See Contact Group, *supra* note 240, at 3.

²⁴³ See Non-Paper, *An International Piracy Court – Not the Right Direction* (unpublished work on file with author) [hereinafter Non-Paper].

²⁴⁴ UN, Contact Group on Piracy off the Coast of Somalia, Factual Statement by the United Nations Office of Legal Affairs on International Tribunals, ¶ 10, Copenhagen, 26-27 August 2009 (on file with author).

persons. "In practice, this has been difficult, and relatively few states have been willing to enter into sentence enforcement and relocation agreements."²⁴⁵ Posing a further challenge is the need for a residual mechanism to carry out necessary functions after the tribunal has completed its work, such as "protection of witnesses, monitoring of sentence enforcement, review of acquittals, convictions and sentences, . . . [and the] preservation and maintenance of archives."²⁴⁶

VIII. CONCLUSION

As pointed out, maritime piracy has a very long history and was thought to have more or less become a matter of the past by the time the modern law of the sea was codified in the twentieth century. Its resurgence, which threatens world trade and international security, is a phenomenon of modern times that seems to have caught the international community by surprise. The international community's response to piracy and armed robbery at sea has therefore only developed gradually and is still hampered by various factors, such as: legislative gaps, as states have not performed their obligations under UNCLOS with respect to the suppression of piracy; legal complexities arising out of the need to harmonize measures against piracy and armed robbery against ships with international humanitarian and human rights instruments; problems regarding coordination among the various naval units engaged in the fight against piracy; and uncertainty regarding the extent to which warships can enforce coercive measures in order to suppress a common crime like piracy.²⁴⁷

At the same time, it must be emphasized that the IMO has, for years, endeavoured to design practical measures to deal with piracy and armed robbery against ships as well as to draft relevant new international legal rules. These efforts, together with those of regional states, have already borne fruit in the Malacca Strait and have recently been extended to East Africa, where they will hopefully soon show positive results. Furthermore, both the Security Council and individual states have been taking more robust action, and an unprecedented armada is now patrolling some of the world's most

²⁴⁵ *Id.*

²⁴⁶ *Id.* at ¶ 11.

²⁴⁷ See Blanco-Bazán, *supra* note 115, at 266-67.

strategically significant waterways. As regards piracy off the coast of Somalia, it has rightly been emphasized that prevention is crucial: "until there is law and order on land, there will be anarchy off the coast."²⁴⁸

The enactment of further modern national anti-piracy legislation is certainly required, as applying to pirates the SUA Convention (which was elaborated as an anti-terrorism instrument) seems to offer only a partial remedy. The conclusion of a special anti-piracy convention regulating the manner in which piracy may be suppressed and the application of the principle of universal jurisdiction would certainly seem useful, although not an absolute necessity. Despite some recent progress regarding the adoption and implementation of relevant national legislation, important challenges remain, in particular, with regard to questions concerning the establishment and exercise of jurisdiction, the fulfilment of evidentiary requirements, and the attribution of law enforcement powers to military personnel.

It remains to be seen whether the international community will eventually decide to establish an international mechanism for the prosecution and punishment of suspected pirates. If there are impediments in this respect in national courts, those should be addressed as a matter of urgency and not deferred in favour of attention to an international tribunal that may not be available anytime soon.²⁴⁹ What should not happen, in any case, is that pirates go free due to the lack of proper legislation or political will, because "[n]o matter how intimidating the presence of an international naval force may be, pirates will not be deterred if they know that there is no law ready to judge them."²⁵⁰

²⁴⁸ See Costa, *supra* note 148, at 1.

²⁴⁹ See Non-Paper, *supra* note 243.

²⁵⁰ Blanco-Bazán, *supra* note 115, at 270.