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THE CONTINGENCIES OF PIRACY

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Pirates are renowned within international law for being *hostis humani generis*—enemies of the entire human race—on account of the beguiling and disruptive presence they have historically delivered on the “anarchic expanse” that passes for “the open ocean of the high seas.”¹ The ninth edition of *Oppenheim*, the classic treatise of international law which made its appearance in 1992, introduces us to pirates by reminding us upfront and center of their “outlaw” status;² for James Lorimer, these roving menaces of the oceans better deserved the designation of “cosmopolitan criminals,” as set forth in his *The Institutes of the Laws of Nations: A Treatise on the Jural*

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1. WILLIAM LANGEWIESCHE, *THE OUTLAW SEA: A WORLD OF FREEDOM, CHAOS AND CRIME* 3 (2004).

2. [1 Peace] *OPPENHEIM’S INTERNATIONAL LAW* 746 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

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Relations of Separate Political Communities, which was published in 1884.³

As far as international law was concerned, the enterprise of the pirate could brook no approval for, at its heart, it involved private acts of violence that had been underwritten by no State whatsoever and, moreover, these threatening proclivities affected the iconic public good of the freedom of the seas as celebrated by Hugo Grotius in his *Mare Liberum* (1609).⁴ For international law, it was therefore essential that pirates were dealt with in an efficient and effective measure, and this was to occur by virtue of the characterization of piracy as an international crime—but not, as might well be thought given the evocative Latin depiction that commenced this essay, as a “crime against humanity.”⁵ Rather, piracy was to be a freestanding crime of international law, separate from any incarnation that it had or might have had in national coda throughout the world.⁶

3. 2 JAMES LORIMER, *THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE ON THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES* 132 (1883) (“When [the law of nations] punishes pirates, it does not punish the citizens of the States to which the pirates belonged, but cosmopolitan criminals, whom it regards as having ceased to be State citizens altogether in consequence of their having broken the laws of humanity as a whole, and become enemies of the human race. Citizen criminals, on the other hand, it simply hands over to the States whose laws they have broken.”).

4. See Charles Fairman, *A Note on Re Piracy Jure Gentium*, 29 AM. J. INT’L L. 508, 508-09 (1935); see also G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT’L L. 727, 727-28 (1989).

5. The concept of “crimes against humanity”, it turns out, was a much later development: WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 11-12 (2nd ed. 2009). Schabas traces this “major innovation” of the law to Article 230 of the Treaty of Sèvres of August 10, 1920. *Id.* at 26. “The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914.” Treaty of Sèvres art. 230, Aug. 10, 1920, T.S. No. 11. See generally Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT’L L. 178 (1946) and DEBORAH E. LIPSTADT, *THE EICHMANN TRIAL* 26 (2011).

6. P.W. Birnie, *Piracy: Past, Present and Future*, 11 MARINE POL’Y 163, 163, 165 (1987) (considering piracy “an age-old offence.”); Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 335 (1925). See generally Part V: *A Collection of Piracy Laws of Various Countries*, 26 AM. J. INT’L L. 887, 893-1013 (Stanley Morrison ed., Supp. 1932). Note that in his dissenting opinion in the *Lotus Case* (1927), Judge Moore qualified his reference to piracy “by the law of

That said, the Judicial Committee of the Privy Council was adept at pointing out in *In re Piracy Jure Gentium* in July 1934 that international law actually had “no means of trying or punishing” pirates,⁷ of bringing them to book as it were, and so the realization of this form of international justice would come to depend in exclusive terms upon the existing machineries of States. The Privy Council thus explained that “[t]he recognition of [piracy] as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country,”⁸ and it is for this reason that we find Emerich de

nations,” because, he wrote, “the municipal laws of many States denominate and punish as ‘piracy’ numerous acts which do not constitute piracy by law of nations, and which therefore are not of universal cognizance, so as to be punishable by all nations.” S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A.) No. 10, at 70 (Sept. 7).

7. *In re Piracy Jure Gentium*, [1934] A.C. 586, 589 (P.C.) (special reference); see also D.H.N. Johnson, *Piracy in Modern International Law*, 43 TRANSACTIONS OF THE GROTIUS SOC’Y 63, 69-70 (1957) (U.K.). Some have maintained that since “pirates are not criminals by the law of nations, [and] since there is no international agency to capture them and no international tribunal to punish them and no provision in the laws of many states for punishing foreigners whose piratical offense was committed outside the state’s ordinary jurisdiction, it cannot truly be said that piracy is a crime or an offence by the law of nations.” See Joseph W. Bingham, *Part IV—Piracy*, 26 AM. J. INT’L L., 739, 756 (Supp. 1932). And, further, that:

[P]iracy is not a crime by the law of nations. It is the basis of an extraordinary jurisdiction in every State to seize and to prosecute and punish persons, and to seize and dispose of property, for factual offences which are committed outside the territorial and other ordinary jurisdiction of the prosecuting state and which do not involve attacks on its peculiar interests.

Id. at 760.

8. *In re Piracy Jure Gentium*, [1934] A.C. at 589. The Privy Council was called upon to define the scope of piracy and concluded that “actual robbery is not an essential element in the crime of piracy *jure gentium*, and that a frustrated attempt to commit piratical robbery is equally piracy *jure gentium*.” *Id.* at 600. The Privy Council keenly observed that “it must always be remembered that the matter under present discussion is not what is piracy under any municipal Act of any particular country, but what is piracy *jure gentium*.” *Id.* at 594. It is this thinking, for example, that guided the approach of the United Nations Convention for the Prevention and Punishment of Genocide of December 1948, which provides, in Article VI, that “[p]ersons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal *of the State in the territory of which the act is committed*”—although the door is open to trial of such persons “by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.” See United Nations Convention for the Prevention and Punishment of Genocide art. IV, Dec. 9, 1948, 78

Vattel declaring in the first book of *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (1758) that “pirates are [to be] sent to the gibbet by the first into whose hands they fall.”⁹

In this telling of matters, the significance of the international criminalization of piracy was that it invested States with the authority to exercise their respective jurisdictions for activities occurring outside their sovereign territories—an innovation immediately recognized by the Privy Council in *In re Piracy Jure Gentium*, since, as a general proposition, it had concluded that the criminal jurisdiction of States was “ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed.”¹⁰ Yet, now, the Privy Council maintained, State jurisdiction was

also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but “hostis humani generis” and as such he is justiciable by any State anywhere.¹¹

U.N.T.S. 277 (emphasis added); see also SCHABAS, *supra* note 5, at 409-61. To this end, Article V of the Convention provides that “[t]he Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III [of the Convention].” United Nations Convention for the Prevention and Punishment of Genocide, *supra*, at art. V.

9. EMER DE VATTEL, *THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 228 (Béla Kapossy & Richard Whatmore eds. 2008) (1758). Vattel identified pirates as examples of “those villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race.” *Id.* at 227-28. In so doing, he equated them with “[p]oisoners, assassins, and incendiaries by profession, [who] may be exterminated wherever they are seized; for they attack and injure all nations by trampling under foot the foundations of their common safety.” *Id.* at 228.

10. *In re Piracy Jure Gentium*, [1934] A.C. at 589; see also VATTEL, *supra* note 9, at 227 (“[T]he justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories.”).

11. *In re Piracy Jure Gentium*, [1934] A.C. at 589 (citing 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS*, Ch. 20, § 40 (1625)).

In the name of the greater good, and by their very actions, pirates were to forfeit the protections that the law afforded them from their home State by unfastening the bonds of national character¹²—all at the time that the law embellished the capacities of States for jurisdictional action. For Judge Moore, in the dissent he appended to the decision of the Permanent Court of International Justice in the *Lotus* Case of September 1927, what this meant was that “in the case of what is known as piracy by the law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation *into whose jurisdiction he may come*.”¹³ That power of States was to be accompanied by rights of visit, search, or seizure of piratical vessels located on the high seas or on *terra nullius*,¹⁴ and it was distinct from any power that States might have had for the summary execution of pirates at sea.¹⁵

12. See L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE (VOL. I: PEACE)* 326 (1905) (“the act of piracy makes the pirate lose his national character, and thereby the protection of his home State”); LORIMER, *supra* note 3, at 131-32.

13. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A.) No. 10, at 70 (Sept. 7) (Moore, J., dissenting) (emphasis added). In his dissenting opinion in that same case, Lord Finlay wrote of “only one exception” to the exercise of criminal jurisdiction by the flag state: “pirates have been regarded as *hostes humani generis* and might be tried in the courts of any country.” *Id.* at 51; see also VAUGHAN LOWE, *INTERNATIONAL LAW* 177-78 (2007).

14. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. at 70. For Judge Nyholm, in his dissenting opinion, “[i]n conformity with the principle of the equality of independent States, all nations have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation, and no State is authorized to interfere with the navigation of other States on the high seas in the time of peace except in the case of piracy by the law of nations or in extraordinary cases of self-defence.” *Id.* at 69; see also MALCOLM N. SHAW, *INTERNATIONAL LAW* 615 (6th ed. 2008).

15. 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 183-191 (John Roland ed., 15th ed. 2002) (“Every nation has a right to attack and exterminate [pirates] without any declaration of war; for though pirates may form a loose and temporary association among themselves, and re-establish in some degree those laws of justice which they have violated with the rest of the world, yet they are not considered as a national body, or entitled to the laws of war as one of the community of nations. They acquire no rights by conquest, and the law of nations, and the municipal law of every country, authorize the true owner to reclaim his property taken by pirates, wherever it can be found; and they do not recognise any title to be derived from an act of piracy. The principle, that *a piratis et latronibus capta dominium non mutant*, is the received opinion of ancient civilians, and modern writers on general

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With its preambular pledge to “a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans,” as well as “the benefits of mankind as a whole,”¹⁶ the United Nations Law of the Sea Convention of December 1982 gives an overarching sense of the strategies available for States to take against piratical action in the modern context; it defines piracy in Article 101,¹⁷ subsequent to its announcement in Article 100 that “[a]ll States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of the State.”¹⁸ Furthermore,

jurisprudence; and the same doctrine was maintained in the English courts of common law prior to the great modern improvements made in the science of the law of nations.”); *see also* VATTEL, *supra* note 9, at 227-28; OPPENHEIM, *supra* note 12, at 330.

16. United Nations Convention on the Law of the Sea pmb., *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter Convention].

17. “Piracy consists of any of the following acts:

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

Id. at art. 101. “A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Art. 101.” *Id.* at art. 103. This definition of piracy is itself dependent on the earlier formulation of the Geneva Convention on the High Seas, art. 15, Apr. 29, 1958, 450 U.N.T.S. 11. *See* SHAW, *supra* note 14, at 398.

18. Convention, *supra* note 16, at art. 100. For the significance of this provision, see R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 209 (3d. ed. 1999) (discussing the “duty” of “every State to act against piracy.”). *Cf.* J. Ashley Roach, *Countering Piracy Off Somalia: International Law and International Institutions*, 104 AM. J. INT’L L. 397, 404 (2010) (discussing “the strong duty of cooperation in the international law of piracy articulated by Art. 100”). Although this obligation, such as it is, is hemmed by qualification (“to the fullest possible extent”) that is not found in the provisions relating to the prohibition of the transport

Article 105 of the Convention provides that States Parties are entitled to seize a pirate ship or aircraft and arrest the persons and seize the property on board¹⁹—but such seizures may only be carried out “by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect,”²⁰ and only when there exists “adequate grounds” for doing so.²¹ This is separate to the right that warships of States possess to visit and board any foreign ship on the high seas for which there is “reasonable grounds” to suspect engagement in piracy—and which is confirmed in Article 110 of the Convention.²² In the pages that follow, we shall single out and concentrate on two of the contingencies underpinning the concept of piracy in the Convention—the idea of piracy as an act of private violence, together with the actual venue where that violence occurs—with a view to assessing their wider implications for practice, as well as how they have informed State and institutional responses of more recent times.

of slaves: “[e]very State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose.” Convention, *supra* note 16, at art. 99; *see also* Roach, *supra*. The comparison might not be appropriate, however, as the transportation of slaves is addressed in the context of flag-State jurisdiction—as is penal jurisdiction in matters of collision or any other incident of navigation. *See id.* at art. 97. “All States shall co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.” *Id.* at art. 108(1).

19. Convention, *supra* note 16, at art. 105.

20. *Id.* at art. 107.

21. *Id.* at art. 106 (“Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.”).

22. *Id.* at art. 110(1)(a); *see also* CHURCHILL & LOWE, *supra* note 18, at 210; ANTONIO CASSESE, *INTERNATIONAL LAW* 90-91 (2d. ed. 2005). The Convention affirms an identical right of visit where: there are reasonable grounds for suspecting that the ship is engaged in the slave trade; the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under Art. 109 of the Convention; the ship is without nationality, or though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship. Convention, *supra* note 16, at art. 110(1)(b)-(e). However, “[i]f the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.” *Id.* at art. 110(3).

* * *

From these articulations, there can be no question of the Convention's construction of piracy in terms of the contingency of "private" violence—or, as the Convention puts it, "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 private aircraft . . ." ²³ The qualification that occurs within this formulation of "illegal" acts of violence or detention could be interpreted as suggesting that not all acts perpetrated by private hands are unlawful *per se*—that is, as a matter of course. ²⁴ This wording gives the definition of piracy a certain flavor of ambiguity to be sure, ²⁵ and it has been argued that the provision would have been far better off (and much more coherent) without it than it is in fact with it. ²⁶ Nevertheless, for the most part, it is clear that the Convention proceeds from this general position as it interposes these acts of private violence against the enforcements envisaged against piratical action by public authorities (in the form of "warships or military aircraft," as well as those ships or aircraft "clearly marked and identifiable as being on government service and authorized to that effect"). ²⁷ Furthermore, the scope of piracy under the Convention is deemed to include acts that are "committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft" ²⁸—a technical expansion of the *ratione personae* for piracy as much as it stands at some variance with another Convention stipulation that the private violence must be directed

23. Convention, *supra* note 19, at art. 101; *see also supra* note 17 and accompanying text; John E. Noyes, *An Introduction to the International Law of Piracy*, 21 CAL. W. INT'L L.J. 105, 106-12 (1990).

24. *See* A.P. RUBIN, *THE LAW OF PIRACY* 333 (1988); *see also* Birnie, *supra* note 6, at 171.

25. Noyes, *supra* note 23, at 106-07.

26. Alfred P. Rubin, *Is Piracy Illegal?*, 70 AM. J. INT'L L. 92, 95 (1976).

27. *See* Convention, *supra* note 16, at art. 107; *see also* LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* 57-58 (2003).

28. Convention, *supra* note 16, at art. 102.

“against *another* ship or aircraft, or against persons or property on board such ship or aircraft.”²⁹

The truth of that matter is while the distinction between legal and illegal acts of private violence might be traced back to the Geneva Convention on the High Seas of April 1958,³⁰ it also betrays a much earlier heritage within the history of international law when privateering was admitted³¹—a practice which, from the thirteenth century onward, involved the governmental commissioning of private violence during maritime warfare.³² Whereas piracy had long since attracted the wrath of the law, privateering was only brought to heel in formal terms in April 1856 with the adoption of the Paris Declaration Respecting Maritime Law (although this did maintain that the practice “*is, and remains, abolished*”).³³ As such, the Declaration has been

29. See *id.* at art. 101(1)(a)(i) (emphasis added). This is a stipulation that has occasioned its own set of criticisms regarding the actual logic that belies this law. See Thomas M. Franck, “*To Define and Punish Piracies*”—*The Lesson of the Santa Maria: A Comment*, 36 N.Y.U. L. REV. 839, 839-44 (1961). The importance of this element was, however, emphasized by the Privy Council in *In re Piracy Jure Gentium*, where it reasoned:

Assume a modern liner with its crew and passengers, say of several thousand aboard, under its national flag, and suppose one passenger robbed another. It would be impossible to contend that such a robbery on the high seas was piracy and that the passenger in question had committed an act of piracy when he robbed his fellow passenger, and was therefore liable to the penalty of death.

In re Piracy Jure Gentium, [1934] A.C. at 592. The Privy Council later made reference to “a shooting affray between two passengers on a liner which could not be held to be piracy.” *Id.* at 598.

30. Rubin, *supra* note 26, at 92 (maintaining this is a provision that “is the product of confusion, not of contemplation”).

31. Rubin, *supra* note 26, at 93-94; Birnie, *supra* note 6, at 171. See generally JANICE E. THOMSON, *MERCENARIES, PIRATES, AND SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE* (1994); K.R. ANDREWS, *ELIZABETHAN PRIVATEERING: ENGLISH PRIVATEERING DURING THE SPANISH WAR, 1585–1603* (1964).

32. See DOCUMENTS ON THE LAWS OF WAR 47 (Adam Roberts & Richard Guelff eds., 3d. ed. 2000).

33. See Paris Declaration Respecting Maritime Law, art. 1, Apr. 16, 1856, 115 C.T.S. 1 (emphasis added); see also LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES 1400-1900*, at 151-57 (2009). Roberts and Guelff are of the view, though, that “virtually all other maritime powers acceded to it over time, and many non-parties acted in accordance with the

understood as setting the foundations for the concept of combatant status, which is so prevalent within the law of land warfare—a cutting back, if it can be so described, of the opportunities for lawful violence by addressing the question of the status and identity of the perpetrators of that violence.³⁴ Remnants of this earlier order are in fact apparent from the U.S. Constitution’s awarding Congress the power “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,”³⁵ in addition to the power it gave Congress to “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”³⁶

Further evidence of the law’s efforts in this regard can be obtained from the 1863 Instructions for the Government of Armed Forces of the United States in the Field (otherwise known as the Lieber Code),³⁷ where “public war” was regarded as “a state of armed hostility between sovereign nations or governments.”³⁸ Within this framework, those belonging to “a public enemy” would attract the status of prisoners of war,³⁹ whereas

rules” and that the Declaration “acquired the status of customary international law.” DOCUMENTS ON THE LAWS OF WAR, *supra* note 32, at 47.

34. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 34-35 (2d. ed. 2010).

35. U.S. CONST. art. I, § 8, cl. 11; *see, e.g.*, Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 *YALE J. L. & HUMAN.* 1, 3-4 (2007). This clause was in fact invoked by Republican Congressman Ron Paul as recently as April 2009 for the purposes of combating piratical action taking place on the high seas off the coast of Somalia. Campaign for Liberty, *Ron Paul on Marque and Reprisal 4/12/09*, YOUTUBE (Apr. 12, 2009), www.youtube.com/watch?v=VrCqVYVxEoA; *see also* Erika Lovley, *Ron Paul’s Plan to Fend Off Pirates*, POLITICO (Apr. 15, 2009, 4:16 AM), www.politico.com/news/stories/0409/21245.html.

36. U.S. CONST. art. I, § 8, cl. 10; *see also* Dickinson, *supra* note 6, at 342.

37. 1863 Instructions for the Government of Armed Forces of the United States in the Field, Apr. 24, 1863, General Orders No. 100 [hereinafter Lieber Code].

38. *Id.* at art. 20 (“It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and war.”).

39. *Id.* at art. 49 (“All soldiers, of whatever species of arms; all men who belong to the rising en masse of the hostile country; all those who are attached to the

[m]en, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers,⁴⁰

armed prowlers,⁴¹ and war rebels⁴² would not.⁴³ Their fates would be sealed on account of their status as determined according to this

army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.") This included "partisans," defined as "soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy." *Id.* at art. 81.

40. *Id.* at art. 82.

41. *Id.* at art. 84. This included "whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads or canals, or of robbing or destroying the mail, or of cutting the telegraph wires. . . ." *Id.*

42. *Id.* at art. 85. War rebels were "persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same." *Id.* Note, though, that "[i]f the people of that portion of an invaded country *which is not yet occupied by the enemy, or the whole country, at the approach of a hostile army*, rise, under a duly authorized levy en masse to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war." *Id.* at art. 51 (emphasis added).

43. For Lieber, "[h]istory confirms these associations, but the law of war as well as the law of peace has treated many of these and kindred subjects—acts justifiable, offensive, or criminal—under acknowledged terms, namely: [t]he freebooter, the marauder, the brigand, the partisan, the free corps, the spy, the rebel, the conspirator, the robber, and especially the highway robber, the rising *en masse*, or the 'arming of peasants.'" See Francis Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War*, in LIEBER'S CODE AND THE LAW OF WAR 31, 34 (Richard Shelley Hartigan ed., 1983) (emphasis added). "No belligerent has the right to declare that he will treat every captured man in arms of a levy en masse as a brigand or bandit." Lieber Code, *supra* note 37, at art. 52. For Lieber had reasoned:

The brigand is, in military language, the soldier who detaches himself from his troop and commits robbery, naturally accompanied in many cases

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register: such “men, or squads of men,” the Lieber Code declared, “are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.”⁴⁴

International law thus connected the question of the validity of violence to the status and identity of the perpetrator or perpetrators of that violence, as is evident from the ruling of the Southern District Court of New York in *The Ambrose Light* (1885):

[T]he liability of the vessel to seizure, as piratical, turns wholly upon the question of whether the insurgents had or had not obtained any previous recognition of belligerent rights, either from their own government or from the political or executive department of any other nation; and that, in the absence of recognition by any government whatever, the tribunals of other nations must hold such expeditions as this to be technically piratical . . . Wheaton defines piracy as “the offence of depredating on the high seas without being authorized by any sovereign state, or with commissions from different sovereigns at war with each other.” Rebels who have never obtained recognition from any other power are clearly not a sovereign state in the eye of international law, and their vessels sent

with murder and other crimes of violence. His punishment, inflicted even by his own authorities, is death. The word brigand, derived as it is from *briguer*, to beg, meant originally beggar, but it soon came to be applied to armed strollers, a class of men which swarmed in all countries in the middle ages. The term has, however, received a wider meaning in modern military technology. He that assails the enemy *without or against the authority of his own government* is called, even though his object should be wholly free from any intention of pillage, a brigand, subject to the infliction of death if captured.

Lieber, *supra*, at 34-35 (emphasis added). Elsewhere, a pirate has been defined as “one who, without legal authority from any State, attacks a ship with intention to appropriate what belongs to it. The pirate is a sea brigand. He has no right to any flag and is justiciable by all.” JOHN BASSETT MOORE, 2 A DIGEST OF INTERNATIONAL LAW 953 (1906); *see also* Sean D. Murphy, *Evolving Geneva Convention Paradigms in the “War on Terrorism”: Applying the Core Rules to the Release of Persons Deemed “Unprivileged Combatants,”* 75 GEO. W. L. REV. 1105, 1110-11 (2007).

44. Lieber Code, *supra* note 37, at art. 82; *see also* KENT, *supra* note 15, at 183-91.

out to commit violence on the high seas are therefore piratical within this definition.⁴⁵

The Privy Council, too, was fully alert to this consideration in *In re Piracy Jure Gentium*, where it cited with approval the conceptualization of piracy as “any armed violence at sea which is not a lawful act of war,”⁴⁶ and it is the same matter that surfaced following the capture of the Portuguese cruise liner *Santa Maria* on the high seas in January 1961.⁴⁷ There is thus a direct equation in these episodes between a sovereign State and those insurgents who have been recognized as belligerents, and their respective entitlements under the laws of war as they were then known,⁴⁸ as set against those actors of a “piratical” character. Indeed, it is this form of reasoning that shaped one of the earliest interpretations of the facts from the famous *Caroline* episode of December 1837 where, it was argued, “[t]he piratical character of the Steam Boat ‘*Caroline*’—and the necessity of self defence and self preservation, under which Her Majesty’s subjects acted in destroying that vessel—would seem to be sufficiently established.”⁴⁹

45. *United States v. Ambrose Light*, 25 F. 408, 412 (S.D.N.Y. 1885) (citations omitted).

46. *In re Piracy Jure Gentium*, [1934] A.C. 586, 598 (citations omitted); see also Ileana M. Porras, *Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius’ De Iure Praedae—The Law of Prize and Booty, or “On How to Distinguish Merchants from Pirates”*, 31 *BROOK. J. INT’L L.* 741, 777 (2006).

47. See generally L.C. Green, *The Santa Maria: Rebels or Pirates*, 37 *BRIT. Y.B. INT’L L.* 496 (1961); C.G. Fenwick, “*Piracy*” in the Caribbean, 55 *AM. J. INT’L L.* 426 (1961).

48. See STEPHEN C. NEFF, *JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR* 26 (2010); Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 *MIL. L. REV.* 109, 110-11 (2000).

49. 3 *DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES, CANADIAN RELATIONS, 1784–1860*, 422 (William R. Manning, ed. 1943) [hereinafter Manning]. These words are those of Henry S. Fox, British Minister to Washington D.C., in a letter to U.S. Secretary of State John Forsyth, dated Feb. 6, 1838, where Fox went on to claim that:

[a]t the time when the event happened, the ordinary laws of the United States were not enforced within the frontier district of the State of New York. The Authority of the Law overborne publickly, by piratical violence. Through such violence, Her Majesty’s subjects in Upper Canada

had already severely suffered; and they were threatened with still further injury and outrage. This extraordinary state of things appears, naturally and necessarily, to have impelled them to consult their own security, by pursuing and destroying the vessel of their piratical enemy, wheresoever they might find her.

Id. at 422-23. Secretary of State Forsyth then informed Andrew Stevenson, the United States Minister to Great Britain, by way of a letter dated Mar. 12, 1838, that:

The attempt made on the part of the Canadian Provincial authorities to justify this act of violence, by alleging as a cause for it, the piratical character of the steamboat *Caroline*, is so preposterous that it cannot be presumed the Metropolitan Government will adopt or attempt to sustain it. The steamboat *Caroline*, the evidence shews, was regularly enrolled and licensed at the port of Buffalo—was intended for a freight and passenger boat—bore the flag of the United States,—and for any violation of the laws of the country, her owner was liable to punishment, if convicted, upon complaint regularly preferred before the judicial tribunals. Piracy, under public law, can only consist in an act which is an offence against all nations. Admitting what has been alleged, that the steamboat *Caroline* was employed in carrying men, arms, ammunition, &c. to the insurgents on Navy Island, it will scarcely be contended that this act, however in contravention of our laws, or those of Canada would justly subject her to the charge of piracy. Voluntary aid, in men, in money, or provisions, to either party in a civil war, is not a crime in the eyes of Great Britain, as the every day practice of her people shews. Such voluntary aid from foreigners to persons in rebellion against their own Government is neither treason nor piracy in those affording it; and unless they are taken in arms against the Government, or within its jurisdiction, no punishment can be rightfully inflicted upon them by that Government. Whatever may have been the offence committed by the *Caroline*, or her crew, the territory of the United States was their protection, and the Canadian authorities had no more right to assail them therein than the United States have to pursue the assailants into Canada, to bring them within their jurisdiction for punishment.

Id. at 50-51; see also R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 85 (1938). In a letter to Fox dated Apr. 24, 1841, Forsyth's successor as Secretary of State, Daniel Webster, remarked that the "offence" of the American citizens involved "whatever it was, had no analogy to piracy" for:

Supposing all that is alleged against [these men] to be true, they were taking a part in what they regarded as a civil war, and they were taking part on the side of the rebels. Surely, England herself has not regarded persons thus engaged as deserving the appellation which Her Majesty's Government bestows on these citizens of the United States. . . . But whether the revolt be recent or long continued, they who join those concerned in it, whatever may be their offence against their own country, or however they may be treated, if taken with arms in their hands, in the territory of the Government, against which the standard of revolt is raised,

Piracy, it is clear from all of these exchanges, carried recognized and profound legal consequences—to the point where, as the Washington Treaty Relating to the Use of Submarines and Noxious Gases in Warfare of February 1922 demonstrates, it was also valued for its rhetorical currency and known connotations. There, the signatory powers dedicated themselves toward the protection of merchant vessels, and their crew and passengers, but,

desiring to ensure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and seizure and destruction of merchant ships, further declare[d] that any person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment *as if for an act of piracy* and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.⁵⁰

Something of the same dynamic could be said to be at work in the Lieber Code.⁵¹

* * *

If piracy depends on the normative character of those who perpetrate its *actus reus*, it is equally definable by the *venue* of where such acts take place. This marks the second critical contingency of piracy to be found in the United Nations Convention on the Law of the Sea, which effortlessly connects those illegal acts of violence, detention, or depredation committed for private ends by the crew or the passengers of a private ship or private aircraft to those *directed on the high seas* against another ship, an aircraft, or persons or property

cannot be denominated Pirates, without departing from all ordinary use of language in the definition of offences. A cause which has so foul an origin as piracy, cannot, in its progress, or by its success, obtain a claim to any degree of respectability, or tolerance, among Nations; and civil wars, therefore, are not understood to have such a commencement.

Manning, *supra* at 141-42. Secretary Webster's firm line appeared to put an end to the matter—for this was the last that was heard of piracy in this correspondence: Jennings, *supra* at 86.

50. Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, art. 3, *opened for signature* Feb. 26, 1922, 25 L.N.T.S. 202 (emphasis added).

51. See *supra* note 44 and accompanying text.

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on board such ship or aircraft—or against a ship, aircraft, persons or property occurring in a place *outside the jurisdiction of any State*.⁵² Lassa Oppenheim gave no ground on this score in the first edition of his treatise on international law, which was published in 1905, where he wrote that “[p]iracy is, and always has been, a crime against the safety of traffic on the Open Sea, and therefore it cannot be committed anywhere else than on the Open Sea.”⁵³

At first blush, the importance of this ingredient might seem a curious component to involve in the construction of piracy. Why should the specific geography of any act of piracy have such seminal bearing as a matter of law? What if the piratical act commences within the territorial sea of a State, but then transfers in due course to the high seas?⁵⁴ Or vice versa?⁵⁵ However, upon further reflection, it

52. See Convention, *supra* note 16. By reference to what was to become the high seas in article 101(a)(i) of the Convention, and then to “a place outside the jurisdiction of any State” in article 101(a)(ii) of the Convention, the International Law Commission “had chiefly in mind acts committed by a ship or aircraft on an island constituting *terra nullius* or on the shores of an unoccupied territory.” 2 Y.B. INT’L L. COMM. 253, 282 (1956); see also, *supra* note 14 and accompanying text. These have also been termed “unappropriated lands.” See WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 314 (A. Pearce Higgins ed., 8th ed. 1924). Or, as Hall stated earlier in his treatise, “[u]sually piracy is spoken of as occurring only upon the high seas. If however a body of pirates land upon an island unappropriated by a civilised power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy.” *Id.* at 313.

53. OPPENHEIM, *supra* note 12, at 330. This is after his designation of piracy as an “international crime”: “[p]iracy as an ‘international crime’ can be committed on the Open Sea only.” *Id.* at 329; see also *id.* at 331. For Hall, “piracy no doubt cannot take place independently of the sea, under the conditions at least of modern civilisation; but a pirate does not lose his piratical character by landing within state territory that piratical acts done on shore cease to be piratical.” See HALL, *supra* note 52, at 313.

54. Gerald P. McGinley, *The Achille Lauro Affair—Implications for International Law*, 52 TENN. L. REV. 691, 696 (1985) (“[W]hile the initial seizure [of the *Achille Lauro* in Oct. 1985] may not have occurred on the high seas, the vessel’s subsequent course took it at least one hundred miles from the Egyptian coast, and during this voyage further acts of depredation occurred. To consider these acts merely criminal and not piratical simply because the *Achille Lauro* may have been seized in territorial waters makes little sense.”) (footnote omitted); see also Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT’L L. 269, 272-91 (1988).

55. See *infra* note 72.

becomes clear how much this criterion conforms to the “landscapes of rule” and their consequences that are set out in the United Nations Convention on the Law of the Sea.⁵⁶ In effect, these landscapes of rule identify certain “jurisdictional competences” for the coastal State,⁵⁷ stretching from what it can do within its territorial sea (“[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea”),⁵⁸ to its contiguous zone,⁵⁹ and its exclusive economic zone.⁶⁰ Amongst other things, the Convention also articulates the freedom of all States (*e.g.*, in respect of the high seas),⁶¹ as well as the jurisdiction and responsibilities of flag States.⁶² It is within this schemata that the provisions with respect to piracy are neatly

56. The terminology, heavily relevant with meaning here, has been coined for an entirely separate context: DONALD S. MOORE, *SUFFERING FOR TERRITORY: RACE, PLACE, AND POWER IN ZIMBABWE* 6 (2005); *see also* LANGEWIESCHE, *supra* note 1, at 36.

57. Malcolm D. Evans, *The Law of the Sea*, in *INTERNATIONAL LAW* 651, 654 (Malcolm D. Evans ed., 3d. ed. 2010).

58. Convention, *supra* note 16, at art. 2(1).

59. *Id.* at art. 33(2) (“[This zone] may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.”). The coastal State may exercise the control necessary to:

- (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
- (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

Id. at art. 33(1).

60. *Id.* at art. 55. (“[This] is an area beyond and adjacent to the territorial sea.”). It has rights and duties for the coastal State, as well as for other States. *Id.* at arts. 56, 58. According to the Convention, “[t]he exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.” *Id.* at art. 57.

61. *Id.* at art. 87; *See also id.* at part VII. The high seas are defined as applying to “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.” *Id.* at art. 86.

62. *Id.* at art. 92(1) (“Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”); *see also id.* at arts. 113-115.

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anchored,⁶³ where they are often viewed as one of the exceptional cases to the “exclusive jurisdiction”⁶⁴ of the flag State on the high seas—which we can now appreciate is not absolute.⁶⁵

Incorporating this contingency—of the actual *venue* of where a particular act of piracy occurs—in the definition therefore becomes a way of speaking about the “operative legal purpose”⁶⁶ of an act of piracy, not just in terms of the potential fate to be meted out to its perpetrators, but of the significance it yields for States in general terms. In fact, the

jurisdiction [for piracy] was, of course, exercised on the high seas and not as an enforcement jurisdiction within the territory of a non-agreeing State. But this historical fact does not mean that universal jurisdiction only exists with regard to crimes committed on the high seas or in other places outside national territorial jurisdiction. Of decisive importance is that this jurisdiction was regarded as lawful because the international community regarded piracy as damaging to the interests of all. War crimes and crimes against humanity are no less harmful to the interests of all because they do not usually occur on the high seas.⁶⁷

For Oppenheim, “[p]iracy in territorial coast waters has quite as little to do with International Law as other robberies on the territory of

63. Note that Article 58(2) provides that Articles 88 to 115 of the Convention “and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.” *Id.* at art. 58(2); *see also* Robert C. Beckman, *Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward*, 33 OCEAN DEV. & INT’L L. 317, 319-20, 328 (2002).

64. Convention, *supra* note 16, at art. 92(1). As the Permanent Court of International Justice phrased it in the *Lotus* Case: “vessels on the high seas are subject to no authority except that of the State whose flag they fly.” *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 7).

65. *See* Convention, *supra* note 16, at art. 110; *see also* CHURCHILL & LOWE, *supra* note 18, at 209; LOUIS B. SOHN & JOHN E. NOYES, *CASES AND MATERIALS ON THE LAW OF THE SEA* 159 (2004).

66. Richard R. Baxter once used this phrase in the context of the concept of terrorism, and its use seems appropriate here. R.R. Baxter, *A Sceptical Look at the Concept of Terrorism*, 7 AKRON L. REV. 380, 380 (1974).

67. Case Concerning the Arrest Warrant of 11 April 2000 (*Congo v. Belg.*), 2002 I.C.J. 3, 81 (Feb. 14) (Higgins, J., Kooijmans, J., & Buergenthal, J., joint separate opinion); *see also* Dickinson, *supra* note 6, at 335.

a State,”⁶⁸ so that it would attract its own consequences—including the provision of enforcement jurisdiction, for this is what the notion of territoriality actually entails.⁶⁹ It thus remains the prerogative of any State as to how it chooses to exercise its prescriptive jurisdiction in this regard,⁷⁰ quite apart from the arrangements made under international law for the international crime of piracy, where “[e]very maritime State has by a customary rule of the Law of Nations the right to punish pirates.”⁷¹ Further,

the vessels of all nations . . . can on the Open Sea chase, attack, seize, and bring the pirate home for trial and punishment by the Courts of their own country. In former times it was said . . . that pirates could at once after the seizure be hanged or drowned by the captor. But this cannot now be upheld . . . [i]t would seem that the captor may execute pirates on the spot only when he is not able to bring them safely into a port for trial; but Municipal Law may, of course, interdict such execution.⁷²

We can therefore appreciate why definitions of the *crime* of piracy may differ, and why they differ the way and the extent they do—for they can inculcate the very consequences of the crime into their respective definitions (so that, for instance, “a State cannot on the Open Sea enforce its Municipal Laws against others than its own subjects, [and] no State can treat such foreign subjects on the Open Sea as pirates as are not pirates according to the Law of Nations.”).⁷³ That said, it is clear that, for some States at least, the definition of

68. See OPPENHEIM, *supra* note 12, at 329; see also Birnie, *supra* note 6, at 164-65.

69. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 76 (1994).

70. CHURCHILL & LOWE, *supra* note 18, at 210 n.13 (“[M]ost of the 252 incidents of ‘piracy’ reported to the [International Maritime Organization] in 1997 in fact took place within the territorial seas and are not, as a matter of international law, piracy.”).

71. See OPPENHEIM, *supra* note 12, at 330.

72. *Id.* (footnotes omitted). These powers were not insignificant: according to Oppenheim, “[i]f a pirate is chased on the Open Sea and flees into the territorial maritime belt, the pursuers may follow, attack, and arrest the pirate there; but they must give him up to the authorities of the riparian State.” *Id.* at 330 n.2. Oppenheim does not provide any authority or evidence for this position.

73. *Id.* at 332; see also Dickinson, *supra* note 6, at 339.

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piracy contained in the United Nations Conventions on the Law of the Sea has come with its invariable limitations. For instance, in April 2005, at the instigation of Japan,⁷⁴ Japan, Laos and Singapore signed the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia⁷⁵—which addresses piracy in the same breath as it does “armed robbery against ships,” or “any illegal act of violence or detention, or any act of depredation, committed for private ends and directed against a ship, or against persons or property on board such ship, *in a place within a Contracting Party’s jurisdiction over such offences.*”⁷⁶ The

74. This occurred following the capture of the *MV Alondra Rainbow* in October 1999. See 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).

75. Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia, Nov. 11, 2004, 44 I.L.M. 829 [hereinafter Combating Piracy Agreement]. There are sixteen parties to this Agreement as of Aug. 1, 2010. INT’L MAR. ORG., www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx (last visited May 25, 2011).

76. *Id.* at art. 1(2)(a) (emphasis added); see also Hayashi, *supra* note 74, at 827. Examples of this tandem treatment are the general obligations announced in Article 3:

- (a) to prevent and suppress piracy and armed robbery against ships;
- (b) to arrest pirates or persons who have committed armed robbery against ships;
- (c) to seize ships or aircraft used for committing piracy or armed robbery against ships, to seize ships taken by and under the control of pirates or persons who have committed armed robbery against ships, and to seize the property on board such ships; and
- (d) to rescue victim ships and victims of piracy or armed robbery against ships.

Combating Piracy Agreement, *supra* note 75, at arts. 2. Examples also include the general obligations announced in Article 10, which concerns requests for cooperation issued by any contracting party through the Information Sharing Center established in Singapore under Article 4, or directly, for any other contracting party

to cooperate in detecting any of the following persons, ships, or aircraft:

- (a) pirates;
- (b) persons who have committed armed robbery against ships;
- (c) ships or aircraft used for committing piracy or armed robbery against ships, and ships taken by and under the control of pirates or persons who have committed armed robbery against ships; or

Agreement does this after reproducing *verbatim* the definition of piracy from Article 101 of the United Nations Law of the Sea Convention.⁷⁷

* * *

We shall now turn to Somalia, where a dramatic increase in piratical action off its shores in recent years has singled these waters out as the most dangerous in the world—ahead of those proximate to Nigeria, Indonesia and Bangladesh.⁷⁸ These developments have been so significant that the Security Council determined, in the preamble to Resolution 1816 of June 2, 2008, 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.”⁷⁹ What deserves notice in this formulation is that it does not limit the concern of the Security Council to the space of the high seas as the governing *ratione loci* for piracy under international law,⁸⁰ but it specifically mentions the territorial waters of

(d) victim ships and victims of piracy or armed robbery against ships. Combating Piracy Agreement, *supra* note 75, at arts. 4, 10; *see also* W. Michael Reisman & Bradley T. Tennis, *Combating Piracy in East Africa*, 35 YALE J. INT’L L. 14, 15 (2009). *See generally* Erik Barrios, *Casting A Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia*, 28 B.C. INT’L & COMP. L. REV. 149 (2005).

77. *See* Combating Piracy Agreement, *supra* note 75, at art. 1(1)(a); *see also supra* note 17 and accompanying text. To be sure, the preamble of the Agreement reaffirms the duty of States to “contribute towards the prevention and suppression of piracy” under the United Nations Convention on the Law of the Sea, and in Article 2(2), it is provided that “[n]othing in this Agreement shall affect the rights and obligations of any Contracting Party under the international agreements to which that Contracting Party is party, including UNCLOS, and the relevant rules of international law.” Combating Piracy Agreement, *supra* note 75, at pmbl., art. 2(2).

78. J. David Goodman, *Piracy Reached Record Level in 2010, Monitors Say*, N.Y. TIMES, Jan. 19, 2011, at A7.

79. S.C. Res. 1816, pmbl., U.N. Doc. S/RES/1816 (June 2, 2008) [hereinafter Resolution 1816]; *see also* Douglas Guilfoyle, *Piracy Off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts*, 57 INT’L & COMP. L.Q. 690, 694-97 (2008). Indeed, in May 2006, the Council had expressed its concern about “the increasing incidents of piracy and armed robbery against ships in waters off the coast of Somalia, and its impact on security in Somalia.” S.C. Res. 1676, pmbl., U.N. Doc. S/RES/1676 (May 10, 2006).

80. *But see supra* note 52 and accompanying text.

Somalia as well. Perhaps this would explain why the Council expressed its grave concern in Resolution 1816 for the “threat” that acts of piracy *as well as those of armed robbery against vessels* posed “on the prompt, safe and effective delivery of food aid and other humanitarian assistance to the people of Somalia, and the grave dangers they pose to vessels, crews, passengers, and cargo.”⁸¹ It is this pairing of interests that continued to inform the Council’s thinking well beyond Resolution 1816, as expressed in Resolutions 1846 and 1851—both of which were adopted in December 2008.⁸² The Council did so by affirming the fact that the United Nations Law of the Sea Convention articulates the legal framework for combating piracy and armed robbery—even though the latter term does not feature at all in the text of the Convention, but is in much greater circulation within the International Maritime Organization.⁸³

81. Resolution 1816, *supra* note 79, at pmbl. The reference to “the prompt, safe and effective delivery of food aid and other humanitarian assistance to the people of Somalia” undoubtedly denotes the seizure of vessels chartered by the World Food Program—including the *MV Rosen* in March 2007. See Audrey Gillan, *Guns, Grenades and GPS: The Brutal Reality of Somalia’s Hi-Tech Pirates*, *GUARDIAN* (U.K.), June 12, 2007, at 23.

82. S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008) [hereinafter Resolution 1846]; S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 18, 2008) [hereinafter Resolution 1851]; see also Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 *EUR. J. INT’L L.* 399, 402-03 (2009). In this period, the Security Council also adopted Resolutions 1838 and 1844. S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008).

83. Treves, *supra* note 82, at 403 (armed robbery “refers only to activities in waters under the jurisdiction of a state, so that it does not extend the scope of provisions on piracy to acts committed on the high seas unless two ships are present . . . [but, where] two or more ships are involved in most of the Somali cases, the mention of ‘armed robbery’ would seem not to be strictly dictated by the needs of existing practice, and rather inspired by the aim of including all acts connected with piracy (such as preparatory acts) and future possible acts involving only one ship.”). See generally MARTIN N. MURPHY, *SMALL BOATS, WEAK STATES, DIRTY MONEY: PIRACY AND MARITIME TERRORISM IN THE MODERN WORLD* (2009). In fact, the Division for Ocean Affairs and the Law of the Sea—which serves as the secretariat of the United Nations Convention on the Law of the Sea—has on its website a section on the “Legal Framework for the Repression of Piracy Under UNCLOS.” *Legal Framework for the Repression of Piracy Under UNCLOS*, THE UNITED NATIONS, www.un.org/depts/los/piracy/piracy_legal_framework.htm (last updated Sept. 9, 2010). There is no equivalent section for “armed robbery” at sea.

Key to understanding all of these developments, of course, is the political turmoil that has beset Somalia since the removal of Siad Barre from power in January 1991. In fact, there is a hint of this history in the resolutions of the Security Council dating back over the past two decades. For example, in December 1992, the Council recognized “the unique character of the present situation in Somalia and . . . its deteriorating, complex and extraordinary nature, requiring an immediate and exceptional response,”⁸⁴ and, more recently, it has been mindful of “the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG) to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia’s territorial waters,”⁸⁵ a keen rewording of the continued reputation of Somalia as a “failed State.”⁸⁶ That condition should not go understated, however, when viewing the circumstances that have given rise to the piracy problem emanating from the territory of Somalia. Some have written of the “humiliation” of Somali fishermen following their exchanges with foreign fishing boats.

They say the bigger boats cut their nets and boxed out their skiffs. They say the foreign fishing boats, years ago, before the pirates were pirates and they were simply poor fishermen, even fired guns at them. The pirates also complain about barrels of toxic waste

84. S.C. Res. 794, pmb., S/RES/794 (Dec. 3, 1992) [hereinafter Resolution 794]. See generally Ioan Lewis & James Mayall, *Somalia*, in THE NEW INTERVENTIONISM 1991–1994: UNITED NATIONS EXPERIENCE IN CAMBODIA, FORMER YUGOSLAVIA AND SOMALIA 94 (James Mayall ed., 1996) (regarding the Council’s assessment of Somalia’s need for intervention).

85. Resolution 1816, *supra* note 79, at pmb. The TFG was assisted in its designs on power as against the Union of Islamic Courts (“UIC”) by an Ethiopian intervention in December 2006. See CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 378-79 (3d. ed. 2008). For its part, the UIC held control of southern Somalia and announced that those committing piracy would be dealt with under Sharia law, but their influence was undercut following the Ethiopian intervention. See Gillan, *supra* note 81, at 23; see also Zeray Yihdego, *Ethiopia’s Military Action Against the Union of Islamic Courts and Others in Somalia: Some Legal Implications*, 56 INT’L & COMP. L.Q. 666, 667-68 (2007).

86. See Jeffrey Gettleman, *Somalia’s Pirates Flourish in A Lawless Nation*, N.Y. TIMES, Oct. 31, 2008, at A1; see also *At Sea: Piracy off the Coast of Somalia is Getting Worse*, ECONOMIST, Feb. 5, 2011, at 16; *Pirates of the Gulf*, FIN. TIMES (U.K.), Feb. 19-20, 2011, at 10 (U.K.).

washing ashore, illegally dumped a few miles out by foreign companies exploiting the fact that Somalia has no government to chase down the dumpers⁸⁷

This sets the pirate firmly within their dramatic but evolving socio-economic context, one in which “crime pays” and where, rather significantly, “it’s about the only industry that does” pay.⁸⁸

The fact remains that though there is some semblance of Government in Somalia in the form of the TFG, it is not able to meet the “capacity” expected of it in respect of interdicting the pirates.⁸⁹ To this end, after having invoked its powers under Chapter VII of the Charter of the United Nations, the Security Council decided in Resolution 1816 the following:

[F]or a period of six months from [June 2, 2008], States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:

(a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; [and]

87. Jeffrey Gettleman, *The Pirates Are Winning!*, N.Y. REV. BOOKS, Oct. 14-27, 2010, at 35-36 (reporting an account that has been corroborated by maritime organizations in East Africa); see also Jason Florio, *The Pirate Port*, 86 VA. Q. REV. 123, 124 (2010); *No Stopping Them: For all the Efforts to Combat it, Somali Piracy is Posing an Even Greater Threat to the World’s Shipping*, ECONOMIST, Feb. 5, 2011, at 68 [hereinafter *No Stopping Them*] (The “predatory pattern” of Somali piracy—which “takes the form of hijacking and extortion, rather than conventional robbery at sea”—has evolved “from ‘defensive’ piracy that began early in the last decade as a response by local fishermen, mainly of the Hawiye clan, to unlicensed foreign trawlers and the dumping of toxic waste. These outsiders exploited the absence of a functioning Somali State capable of protecting its coastal waters.”).

88. Gettleman, *supra* note 87, at 35; see also Guilfoyle, *supra* note 79, at 699. On the thriving piracy economy, see *No Stopping Them*, *supra* note 87, at 70, and see also Jeffrey Gettleman, *Suddenly, A Rise in Piracy’s Price*, N.Y. TIMES, Feb. 27, 2011, at WK1. The Security Council has also referred to “the phenomenal growth in piracy.” Resolution 1851, *supra* note 82, ¶ 9.

89. See *supra* note 85 and accompanying text; see also Donald R. Rothwell, *Maritime Piracy and International Law*, CRIMES OF WAR PROJECT (Feb. 24, 2009), www.crimesofwar.org/onnews/news-piracy.html.

(b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.⁹⁰

This provision of the Security Council—for those States co-operating with the TFG to enter the territorial waters of Somalia and

90. Resolution 1816, *supra* note 79, ¶ 7. The first of these paragraphs has been understood to posit a so-called “reverse right of pursuit,” running in the opposite direction of the right of hot pursuit contained in the Convention, which provides that:

The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. *Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted.* It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone.

Convention, *supra* note 16, at art. 111(1) (emphasis added). *See generally* Robert C. Reuland, *The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention*, 33 VA. J. INT’L L. 557 (1993). For a useful discussion of the problems in the assertion of this analogy, see Douglas Guilfoyle, *Piracy off Somalia: A Sketch of the Legal Framework*, EJIL TALK! (Apr. 20, 2009), www.ejiltalk.org/piracy-off-somalia-a-sketch-of-the-legal-framework/. *But see supra* note 72 and accompanying text (providing Oppenheim’s position).

This authorization was extended for a period of twelve months from December 2, 2008. Resolution 1846, *supra* note 82, ¶ 10. It was done pursuant to:

the requests from the TFG for international assistance to counter piracy off its coasts, including the 1 September 2008 letter from the President of Somalia to the Secretary-General of the United Nations expressing the appreciation of the TFG to the Security Council for its assistance and expressing the TFG’s willingness to consider working with other States and regional organizations to combat piracy and armed robbery at sea off the coast of Somalia, the 20 November 2008 letter conveying the request of the TFG that the provisions of resolution 1816 (2008) be renewed, and the 20 November request of the Permanent Representative of Somalia before the Security Council that the renewal be for an additional 12 months.

Id. at pmb1. The TFG made further requests to the Council for the extension of this authorization for an additional twelve months. S.C. Res. 1897, pmb1., S/RES/1897 (Nov. 30, 2009) [hereinafter Resolution 1897].

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to use, within those waters, all necessary means to repress acts of piracy and armed robbery—is a clear attempt to supplement existing arrangements, and address the possible shortcomings of the “legal framework” contained in the United Nations Convention on the Law of the Sea.⁹¹ What can be immediately observed from this position is that the Security Council in no way viewed the piratical violence from Somalia and the various responses to it as instigating or forming part of any overarching “armed conflict”—whether in terms of an international armed conflict or of a non-international armed conflict that, for want of a better phrase, had migrated offshore.⁹² No reference is made in any of these Security Council resolutions to “international humanitarian law,” a system of rules that is predicated on the *existence* of one form or other of an armed conflict under the Geneva Conventions of August 1949 and their Additional Protocols of June 1977. This point cannot go unnoticed given the previous practice of the Council to make citations of international humanitarian law where it has found it appropriate to do so in order to refer them to relevant parties.⁹³ To have done so would have presumably implicated the

91. Resolution 1816, *supra* note 79, at pmb.; *see also supra* note 83 and accompanying text.

92. *See Treves, supra* note 82, at 412. The “antipiracy campaign” is mentioned, together with the war on terror that has occurred since September 11, 2001, as raising questions “about the legal status of conflicts between states and diffuse armed networks with international operations.” Eugene Kontorovich, “*A Guantánamo of the Sea*”: *The Difficulty of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. 243, 245, 259-62 (2010); *see also* TOM FARER, CONFRONTING GLOBAL TERRORISM AND AMERICAN NEO-CONSERVATISM: THE FRAMEWORK OF A LIBERAL GRAND STRATEGY 76 (2008) (“If [the] armed forces [of the United States] encountered Al Qaeda operatives aboard a ship on the high seas flying no national flag, it certainly was privileged to attack and destroy the ship or to seize the operatives.”). *See generally* Michael H. Passman, *Protections Afforded to Captured Pirates under the Law of War and International Law*, 33 TUL. MAR. L.J. 1 (2008).

93. The Council did so when it expressed grave alarm “at continuing reports of widespread violations of international humanitarian law occurring in Somalia, including reports of violence and threats of violence against personnel participating lawfully in impartial humanitarian relief activities; deliberate attacks on non-combatants, relief consignments and vehicles, and medical and relief facilities; and impeding the delivery of food and medical supplies essential for the survival of the civilian population.” Resolution 794, *supra* note 84, at pmb. *See generally* Christiane Bourloyannis, *The Security Council of the United Nations and the Implementation of International Humanitarian Law*, 20 DENV. J. INT’L L. & POL’Y 335 (1992).

Council in some measure of acceptance that certain acts of *lawful* violence could occur by pirates and armed robbers within the context of the respective war or armed conflict,⁹⁴ when, throughout this period,⁹⁵ the Council has been firmly of the view that what is involved here is a law-enforcement operation—and an enforcement of the rules of international law at that.⁹⁶

If the TFG therefore exists in some identifiable form and it was prepared to provide its consent—whether in the form of advance notification or not—to States willing to cooperate with it in the “fight” against piracy and armed robbery at sea off the coast of Somalia,⁹⁷ why would Security Council authorization be needed at all? Would the consent of the government of the State not in and of itself be sufficient? Consent in international law is not intended to serve as some hollow formalism, or to be an empty ritual that confers lawfulness upon a given intervention. There is the issue of the *validity* of that consent that must and should come into play at some point, since “there may be a question whether the State could validly consent at all,”⁹⁸ depending on whether it has the appropriate authority to do so, and has issued the consent under necessary conditions.⁹⁹ Given the systemic uncertainty regarding the TFG in Somalia, as well as the recognized fact that it was unable to execute one of the principal

94. As the Duke of Argyll had informed John Morley by correspondence in May 1861, “when the American colonies revolted from England we attempted to treat their privateers as pirates. But we very soon found this would be out of the question . . . the rules affecting and defining the rights and duties of belligerents are the only rules which prevent war from becoming massacre and murder.” See 2 GEORGE DOUGLAS, EIGHTH DUKE OF ARGYLL, K.G., K.T. (1823–1900): AUTOBIOGRAPHY AND MEMOIRS 170 (The Dowager Duchess of Argyll, ed., 1906); see also KENT, *supra* note 15, at 183-91; NEFF, *supra* note 48, at 59-60.

95. See *supra* note 82 and accompanying text.

96. Consider, however, the different use to which this terminology is put in YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 247 (4th ed. 2005).

97. See *supra* note 90 and accompanying text.

98. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 163-64 (2002).

99. See GRAY, *supra* note 85, at 84-88. See generally Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT’L L. 189 (1985).

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functions of a State,¹⁰⁰ concerns and even criticisms might well have taken shape regarding the absence or ebbing of its authority for issuing any valid consent under international law, including the provision of advance notification to the Secretary-General of the United Nations. This would have put the legal basis of the ensuing enforcement operation at perpetual risk, so that an authorization from the Security Council under Chapter VII of the Charter—as occurred in Resolution 1101 (1997), where the Government of Albania had consented to an outside intervention while on the brink of civil war¹⁰¹—put its legal basis beyond any doubt.¹⁰²

Importantly, the Council was most cautious in providing its authorization under Chapter VII of the Charter,¹⁰³ and several elements of this caution commend themselves for consideration here. First, the Council set the stopwatch running on the duration of the authorization it gave (*ratione temporis*).¹⁰⁴ Second, the authorization of the Council applies only with respect to the situation in Somalia; thus, it is strictly confined in terms of geographical space (*ratione*

100. See *supra* note 85 and accompanying text.

101. See Letter from the Permanent Representative of Albania to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1997/259 (Mar. 28, 1997) [hereinafter Letter from Permanent Representative of Albania to the United Nations]. Indeed, the Security Council encouraged “the Member States participating in the multinational protection force to cooperate closely with the Government of Albania, the United Nations, the OSCE, the European Union, and all international organizations involved in rendering humanitarian assistance to Albania” S.C. Res. 1101, ¶ 8, U.N. Doc. S/RES/1101 (Mar. 28, 1997) [hereinafter Resolution 1101] (emphasis added). The Resolution took note of the letter of the Permanent Representative of Albania earlier that same day, which made reference to “the official appeal of the Government of Albania to a group of countries.” Letter from Permanent Representative of Albania to the United Nations, *supra*; Resolution 1101, *supra*, at pmb1. See generally Dino Kritsiotis, *Security Council Resolution 1101 (1997) and the Multinational Protection Force of Operation Alba in Albania*, 12 LEIDEN J. INT’L L. 511 (1999) (Neth).

102. Valid consent, though, is significant from the perspective of determining the existence of an international armed conflict. See DINSTEIN, *supra* note 96, at 245.

103. Treves is of the view that the Council proceeded “very cautiously.” See Treves, *supra* note 82, at 404.

104. See *supra* note 90 and accompanying text.

loci).¹⁰⁵ Third, the addressees of the authorization are not *all* States, but only those “States co-operating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia”¹⁰⁶—an effort, we can presume, to avoid any State from becoming a chancer upon the action. This effort does come with a notable precedent since, in Resolution 678 (1990), the Council authorized “Member States [of the United Nations] *co-operating with the Government of Kuwait*, unless Iraq on or before 15 January 1991 fully implements . . . [previous Security Council] resolutions, to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area” (*ratione personae*).¹⁰⁷ Finally, it is worth observing how, in

105. See *supra* note 90 and accompanying text; Treves, *supra* note 82, at 404-05. Indeed, the Council affirmed:

that the authorization provided in this resolution applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law, and affirms further that this authorization has been provided only following receipt of the letter from the Permanent Representative of the Somalia Republic to the United Nations to the President of the Security Council dated 27 February 2008 conveying the consent of the TFG.

Resolution 1816, *supra* note 79, ¶ 9. When the Council extended its authorization for twelve months, it did so for States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General of the United Nations to “undertake all necessary measures that are appropriate *in Somalia*, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG.” Resolution 1851, *supra* note 82, ¶ 6 (emphasis added). This was an amendment apparently designed to cover the circumstances that had led to the recapture of the French cruise ship *Le Ponant* at Garaad in April 2008. See Xan Rice, *Yacht Seized By Pirates Anchors Off Somalia*, GUARDIAN (U.K.), Apr. 7, 2008, at 17.

106. Resolution 1816, *supra* note 79, ¶ 7.

107. S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990) (emphasis added); see also Vaughan Lowe, *The Iraq Crisis: What Now?*, 52 INT’L & COMP. L.Q. 859, 866 (2003). Similarly, the Council affirmed “the commitment of all Member States to the independence, sovereignty and territorial integrity of Iraq and Kuwait, and [noted] the intention expressed by *the Member States cooperating under paragraph 2 of Security Council Resolution 678 (1990)* to bring their military presence in Iraq to an end as soon as possible consistent with achieving the

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June 2008, the Council supplied, in effect, two authorizations in Resolution 1816: it carefully dissected its authorization for the entry of cooperating States into Somalia from its authorization of the use of all necessary means to repress acts of piracy and armed robbery “within the territorial waters of Somalia”¹⁰⁸ (*ratione materiae*).

The Council did not stop with these terms, however, for, once caught, the prosecution of those suspected of piracy becomes a live, palpable and very real question. In this respect, the Council proceeded in Resolution 1816 to call upon *all* States

and in particular flag, port and coastal States, States of the nationality of victims and perpetrators of piracy and armed robbery, and other States with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including international human rights law, and to render assistance by, among other actions, providing disposition and logistics assistance with respect to persons under their jurisdiction and control, such victims and witnesses and persons detained as a result of operations conducted under this resolution.¹⁰⁹

In essence, this provision requires States “to cooperate in determining jurisdiction,”¹¹⁰ as it anticipates that the jurisdiction to prosecute pirates could well stem from accepted principles of jurisdiction *other* than that of universal jurisdiction in international

objectives of the resolution.” S.C. Res. 686, pmb., U.N. Doc. S/RES/686 (Mar. 2, 1991) (emphasis added). Furthermore, the Council demanded that Iraq designate military commanders to meet with counterparts “from the forces of Kuwait and the Member States cooperating with Kuwait pursuant to Resolution 678 (1990) to arrange for the military aspects of a cessation of hostilities at the earliest possible time.” *Id.* ¶ 3 (emphasis added).

108. Resolution 1816, *supra* note 79, ¶ 7.

109. *Id.* ¶ 11.

110. *Id.* It also requires states to cooperate in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia—and “to render assistance by, among other actions, providing disposition and logistics assistance with respect to persons under their jurisdiction and control, such victims and witnesses and persons detained as a result of operations conducted under this resolution.” *Id.*

law.¹¹¹ Viewed from this angle, Resolution 1816 reads as an itinerary of these possibilities, since it mentions “the nationality of victims,”¹¹² the defining feature of the principle known as passive personality,¹¹³ and the nationality of “perpetrators or piracy and armed robbery,”¹¹⁴ the basis of the principle of nationality (and is reinforced by the reference in Resolution 1816 to flag States).¹¹⁵ Port and coastal States could, of course, invoke the principle of territorial jurisdiction,¹¹⁶ and it is then that we find universal jurisdiction canvassed, within the context of “other States with relevant jurisdiction under international law and national legislation.”¹¹⁷ This could well be understood to take the shine off the promise of universal jurisdiction in such matters,¹¹⁸ but the value of this aspect of Resolution 1816 lies in its regulation of the concurrence of jurisdictions through a duty of cooperation, aside from judicial self-restraint within or negotiated settlements between involved States.¹¹⁹

* * *

And as it is with pirates, so it is with slave traders and torturers, at least as far as civil liability is concerned—or so we learnt from the decision in *Filártiga v. Peña-Irala* in June 1980.¹²⁰ But where does

111. Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 235-36 (2004).

112. Resolution 1816, *supra* note 79, ¶ 11.

113. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 304 (7th ed. 2008).

114. Resolution 1816, *supra* note 79, ¶ 11. *But see* sources cited *supra* note 12.

115. *Id.*; *see also* BROWNLIE, *supra* note 113, at 303, 318; Vaughan Lowe & Christopher Staker, *Jurisdiction*, in *INTERNATIONAL LAW* 313, 324 (Malcolm D. Evans ed., 3d. ed. 2010).

116. *See* BROWNLIE, *supra* note 113, at 301-03; Resolution 1816, *supra* note 79, ¶ 11.

117. Resolution 1816, *supra* note 79, ¶ 11.

118. *See generally* Joshua Michael Goodwin, *Universal Jurisdiction and the Pirate: Time for An Old Couple to Part*, 39 VAND. J. TRANSN'L L. 973 (2006).

119. *See* LOWE, *supra* note 13, at 183-84.

120. *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (“[F]or purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy to all mankind.”); *see also* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (1984) (“The inference is that persons may be susceptible to civil liability if they commit either a crime traditionally warranting

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this leave universal jurisdiction as a criminal matter—and slave traders and torturers as international criminals and as successor materializations of *hostis humani generis*?¹²¹

For Matthew Tindall in *An Essay Concerning the Laws of Nations and the Rights of Sovereigns* (1694), *hostis humani generis* “is neither a Definition, [n]or as much a Description of a Pirat [sic], but a Rhetorical Invective to shew the Odiousness of the Crime.”¹²² If this has been borne out at all for pirates in terms of the provision of universal jurisdiction, then it is more difficult to discern for slave traders—at least as far as the United Nations Convention on the Law of the Sea is concerned, which roots its approach in the responsibilities of the flag State.¹²³ Analogies with the international crime of piracy should therefore be more coolly received.¹²⁴ As for torturers, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 1984 requires each State party to take such measures so as to establish jurisdiction for all acts of torture (including attempts to commit torture and complicity or participation in torture), though the Convention enters qualifications as to where: the offence occurs in any territory under the jurisdiction of a State party or on board a ship or aircraft registered in that State;¹²⁵ the alleged offender is a national of that

universal jurisdiction or an offense that comparably violates current norms of international law.”); Donald F. Donovan & Anthea E. Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT’L L. 142, 143-44 (2006).

121. See Jody Greene, *Hostis Humani Generis*, 34 CRITICAL INQUIRY 683 (2008); see also Robert Alfert, Jr., *Hostes Human Generis: An Expanded Notion of U.S. Counterterrorist Legislation*, 6 EMORY INT’L L. REV. 171, 181-83 (1992).

122. MATTHEW TINDALL, *AN ESSAY CONCERNING THE LAWS OF NATIONS AND THE RIGHTS OF SOVERAIGNS* 25-26 (1694); see also Kontorovich, *supra* note 111, at 233-36 (stating that *hostis humani generis* is regarded as an “ominous-sounding epithet.”).

123. See *supra* note 18 and accompanying text. *But see supra* note 22 and accompanying text.

124. CHURCHILL & LOWE, *supra* note 18, at 212 (“Other States may only report their findings to the flag State, which is, however, obliged to adopt effective measures for the repression of slave trading by its ships.”).

125. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5(1)(a), *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter *Convention Against Torture*].

State;¹²⁶ and the victim was a national of that State if that State considers it appropriate.¹²⁷ The Convention goes on to provide that “[e]ach State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him”¹²⁸ to any of the States that possess jurisdiction pursuant to the Convention.¹²⁹ Given these specifications, it is difficult to eke out a narrative of universal jurisdiction for the Convention Against Torture since, *stricto sensu*, this would need to relate to the competence of “any State to assert jurisdiction over an offence,”¹³⁰ which is what we have observed above with respect to pirates. This position should be usefully contrasted with the jurisdictional regime for torture that occurs in the context of international armed conflicts, as established in the provisions concerning grave breaches of the Geneva Conventions of August 1949.¹³¹

126. *Id.* at art. 5(1)(b).

127. *Id.* at art. 5(1)(c).

128. *Id.* at art. 5(2). “The offences referred to [in the Convention] shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.” *Id.* at art. 8(1). “The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to [in this Convention] is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.” *Id.* at art. 7(1).

129. *Id.* at art. 5(1); *see also supra* notes 125-27.

130. *See HIGGINS, supra* note 69, at 64.

131. *See BROWNLIE, supra* note 113, at 306; *see also* Christopher Greenwood, *International Humanitarian Law and the Tadic Case*, 7 EUR. J. INT’L L. 265, 275-76 (1996) (It.). “Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.” Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 75 U.N.T.S. 287 (emphasis added). This provision relates to “any of the following acts, *if committed against persons or property protected by the present Convention*: willful [sic] killing, torture or inhuman treatment, including biological experiments, willfully [sic] causing great suffering or serious injury to body or health . . . , compelling a [prisoner of war] to serve in the forces of the

To be sure, comparisons with piracy might be on more equal footing when they are made within the realm of custom,¹³² for it is there that the forerunner laws to the United Nations Convention on the Law of the Sea will be found.¹³³ This, in turn, might produce a more intriguing set of revelations, as occurred in *Pinochet III* in March 1999,¹³⁴ where Lord Millett made the observation that “[e]very State has jurisdiction under customary international law to exercise extraterritorial jurisdiction,”¹³⁵ and that, if the focus was shifted from the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, an altogether different jurisdictional result would transpire:

hostile Power, or willfully [sic] depriving a [prisoner of war] of the rights of fair and regular trial prescribed in the present Convention.” *Id.* at art. 147 (emphasis added). Note that, in the context of non-international armed conflicts, torture (amongst other things) is prohibited at any time and in any place whatsoever with respect to “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause.” *Id.* at art. 3. But, here, each High Contracting Party is only bound to “take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches [set out in the Conventions].” *Id.* at art. 146. *See generally* Sonja Boelaert-Suominen, *Grave Breaches, Universal Jurisdiction and Internal Armed Conflicts: Is Customary Law Moving Towards A Uniform Enforcement Mechanism for All Armed Conflicts?*, 5 J. CONFLICT & SECURITY. L. 63 (2000).

132. Oscar Schachter, *Entangled Treaty and Custom*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 717, 725-26 (Yoram Dinstein & Mala Tabory eds., 1989).

133. *See supra* note 16 and accompanying text. As the Convention advises in its preamble, “the codification and progressive development of the law of the sea” occurring therein “will contribute to the strengthening of peace, security, co-operation and friendly relations among all nations in conformity with the principles of justice and equal rights”—but that “matters not regulated by this Convention continue to be governed by the rules and principles of general international law.” Convention, *supra* note 16, at pmb1.

134. Regina v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte Pinochet Ugarte (Pinochet III)*, [2000] 1 A.C. 147.

135. *Id.* at 276. For Lord Millett, “crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order.” *Id.* at 275.

the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1973. For my own part, therefore, I would hold that the courts of this country already possessed extraterritorial jurisdiction in respect of torture and conspiracy to torture on the scale of the charges in the present case and did not require the authority of statute to exercise it.¹³⁶

All of this said, it is interesting to note in conclusion that in its more recent practices on Somalia,¹³⁷ the Security Council has also

136. *Id.* at 276. For Lord Browne-Wilkinson, the law of piracy related to “the concept of personal liability under international law for international crimes [which] is of comparatively modern growth.” *Id.* at 197; Lord Phillips wrote that “there has been developing a recognition among States that some types of criminal conduct cannot be treated as a matter for the exclusive competence of the State in which they occur.” *Id.* at 288. Lord Phillips further noted that:

while no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect. That principle consists both in the adoption of the rule of universality of jurisdiction and in the recognition of the supremacy of the law of humanity over the law of the sovereign state when enacted or applied in violation of elementary human rights in a manner which may justly be held to shock the conscience of mankind.

Id. (citing [1 Peace] OPPENHEIM’S INTERNATIONAL LAW 998 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992)).

137. See Resolution 1846, *supra* note 82, ¶ 15; Resolution 1897, *supra* note 90, ¶ 14 (urging states “to the [United Nations] Convention [on the Law of the Sea] and the [Suppression of Unlawful Acts against the Safety of Maritime Navigation] Convention to fully implement their relevant obligations under these Conventions and customary international law”). The Security Council had noted:

with concern that the continuing limited capacity and domestic legislation to facilitate the custody and prosecution of suspected pirates after their capture has hindered more robust international action against pirates off the coast of Somalia, and in some cases has led to pirates being released without facing justice, regardless of whether there is sufficient evidence to support prosecution, [and] [*reiterated*] that, consistent with the provisions of the [United Nations] Convention [on the Law of the Sea], the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation . . . provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or

placed its faith in the Rome Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation of March 1988,¹³⁸ which arose in the wake of the *Achille Lauro* affair of October 1985.¹³⁹ The Council has done this alongside its earlier

suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation, and [stressed] the need for States to criminalize piracy under their domestic law and to favourably consider the prosecution, in appropriate cases, of suspected pirates, consistent with applicable international law.

Id. at pmb1.

For a very useful analysis of Kenya's contribution in this regard, see James Thuo Gathii, *Kenya's Piracy Prosecutions*, 104 AM. J. INT'L L. 416 (2010); Resolution 1897, *supra* note 82, at pmb1. (commending Kenya's "efforts to prosecute suspected pirates in its national courts, and noting with appreciation the assistance being provided by the United Nations Office of Drugs and Crime . . . and other international organizations and donors, in coordination with the Contact Group on Piracy off the Coast of Somalia . . . to support Kenya, Somalia and other States in the region, including Seychelles and Yemen, to take steps to prosecute or incarcerate in a third State after prosecution elsewhere captured pirates consistent with applicable international human rights law.").

138. Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, *adopted* Mar. 10, 1988, 1678 U.N.T.S. 201 [hereinafter Convention on Suppression].

139. See *supra* note 54 and accompanying text; see also Treves, *supra* note 82, at 410. According to Article 3 of the Convention on Suppression:

1. Any person commits an offence if that 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

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

statement on the duty to cooperate for concurrent jurisdictions.¹⁴⁰ The Convention is not as bound by the contingency of venue in terms of the offense it inaugurates,¹⁴¹ and, separate to the arrangements that exist for piracy in international law, the Convention adopts a unique duality of jurisdictional obligations and entitlements for its State parties.¹⁴² According to these terms, jurisdiction must be established for the aforementioned offense where the offense is committed: “(a) against or on board a ship flying the flag of the State at the time the offence is committed, or (b) in the territory of that State, including its territorial sea; or (c) by a national of that State.”¹⁴³ Furthermore, jurisdiction *may* be established when: “(a) it is committed by a stateless person whose habitual residence is in that State; or (b) during its commission a national of that State is seized, threatened, injured or

(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

2. Any person also commits an offence if that person:

(a) attempts to commit any of the offences set forth in paragraph 1; or

(b) abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

(c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

Convention on Suppression, *supra* note 139, at art. 3.

140. See *supra* notes 109-10 and accompanying text; see also Resolution 1846, *supra* note 82, ¶ 14; Resolution 1897, *supra* note 90, ¶ 12.

141. Convention on Suppression, *supra* note 139, at art. 3. The Convention, however, “applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States”—although where this provision is not applicable, the Convention shall nevertheless apply “when the offender or the alleged offender is found in the territory of a State Party other than the State referred to in [Art. 4(1)].” *Id.* at art. 4(2).

142. As of May 3, 2011, there are currently 157 states parties. *Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Function*, INT’L MAR. ORG., 1, 391-93 (May 3, 2011), www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202011.pdf.

143. *Id.* at art. 6(1).

killed; or (c) it is committed in an attempt to compel that State to do or abstain from doing any act.”¹⁴⁴

The provisions of this Convention have been emphasized outside the Security Council,¹⁴⁵ and, in the process, it has become very clear that the scope for universal jurisdiction has not been fully and faithfully realized in the practice of States. This has all occurred at a time when, it has been claimed, “the professionalization, spread and escalation” of piracy could reach “a point of no return.”¹⁴⁶ Somalia itself, for instance, has yet to criminalize piracy within its national code,¹⁴⁷ a development that has been encouraged as an aspect of “[t]he Somalization of solutions.”¹⁴⁸ For its part, Kenya has adopted new legislation in the form of the 2009 Merchant Shipping Act¹⁴⁹ that finally molds its penal code in the image of the Convention on the Law of the Sea as well as the Convention for the Suppression of

144. *Id.* at art. 6(2). On this point of a duality of jurisdictional obligations and entitlements, consider how the Convention Against Torture lines up its provision of mandatory jurisdiction for territoriality and nationality alongside that for passive personality. See Convention Against Torture, *supra* note 126, at art. 5(1)(a)-(b). But, in this latter respect, it does so only as and where “that State considers it appropriate,” what might well be regarded as a taming of the obligation expressed in the *chapeau* of art. 5(1) of the Convention Against Torture. *Id.* at art. 5(1)(c).

145. Special Advisor to the Secretary-General, Legal Issues Related to Piracy Off the Coast of Somalia, ¶ 49 (Jan. 20, 2011) [hereinafter Report of Special Adviser] (copy on file with the author). The Report was prepared by the French politician Jack Lang as part of a process initiated by the Security Council of “further[ing] the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia.” S.C. Res. 1918, ¶ 4, U.N. Doc. S/RES/1918 (Apr. 27, 2010).

146. Report of Special Adviser, *supra* note 145, ¶ 8. “If the international community does not act with extreme urgency, Somalia’s piracy economy will continue to grow, past the point of no return.” *Id.* ¶ 142.

147. Efforts are certainly afoot to do so. However, this has been complicated by the adoption of a law modeled after legislation adopted by the Seychelles by the Parliament of Puntland, but not (as yet) adopted by the Parliament of Mogadishu; the Government of Somaliland has agreed to submit the proposed law to the Parliament of Hargeisa. See Report of Special Adviser, *supra* note 145, ¶ 105. This law ultimately derives from the Convention on the Law of the Sea, *supra* note 16. Although, consider that Somalia has claimed a territorial sea of 200 miles. Report of the Special Adviser, *supra* note 145, ¶ 89.

148. Report of Special Adviser, *supra* note 145, ¶¶ 79-80.

149. Merchant Shipping Act, (2009) Cap. No. 4 (Kenya).

Unlawful Acts against the Safety of Maritime Navigation.¹⁵⁰ And Belgium, France, the Netherlands, the Seychelles, Spain and Tanzania have yet to take serious advantage of their “universal or near-universal jurisdiction” to prosecute those individuals suspected of piracy.¹⁵¹ These all seem essential actions for States to have to take if the promise of universal jurisdiction is ever to be fulfilled, which, in turn, will facilitate the redeeming of their obligation under the Convention on the Law of the Sea to “co-operate 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.”¹⁵² There are, it is quite true, other avenues that States might wish to pursue with regard to their handling of suspected pirates,¹⁵³ but, as things stand, much more needs to be done in terms of demonstrating the seriousness of the commitment toward tackling the piracy problem and to the regularization of the prosecution and punishment of pirates beyond the paltry statistics such as they now are.¹⁵⁴

150. See Gathii, *supra* note 138, at 422, 426, 429; Report of Special Adviser, *supra* note 145, ¶ 50 (“Once its deficiencies have been corrected, the Acts should constitute a solid legal basis for Kenya to exercise its universal jurisdiction.”). See generally James Thuo Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured by Third States under Kenyan and International Law*, 31 *LOY. L.A. INT’L & COMP. L. REV.* 363 (2009).

151. Report of Special Adviser, *supra* note 145, ¶ 51.

152. Convention, *supra* note 16, at art. 100.

153. Report of Special Adviser, *supra* note 145, ¶ 48 (“General international law provides for multiple forms of jurisdiction without establishing priority rules”). See generally Kontorovich, *supra* note 111 (discussing principles of jurisdiction other than universal jurisdiction).

154. The figure that has been presented is that, as of May 2010, “over nine out of ten captured pirates have not been prosecuted.” See Report of Special Adviser, *supra* note 145, ¶ 43.

