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## WALKING THE PLANK: HOW UNITED NATIONS SECURITY COUNCIL RESOLUTION 1816, WHILE PROGRESSIVE, FAILS TO PROVIDE A COMPREHENSIVE SOLUTION TO SOMALI PIRACY

*Matthew C. Houghton\**

### I. INTRODUCTION

*"The high seas shall be reserved for peaceful purposes."*<sup>1</sup>

On April 4th, 2008 the French sailing yacht *Le Ponant* left the Seychelles to return back to the Mediterranean.<sup>2</sup> As most of the ship's wealthy passengers had disembarked at the last port of call, only a skeleton crew manned the *Le Ponant* as it navigated the Gulf of Aden.<sup>3</sup> The pirates first commandeered a Yemeni trawler vessel which subsequently served as their base ship before the attack on the *Le Ponant*.<sup>4</sup> When the Somali pirates noticed the *Le Ponant*, its peaceful voyage was suddenly interrupted by bursts of automatic gunfire and swarming speedboats.<sup>5</sup> Armed with only a fire hose, the *Le Ponant* and her crew were defenseless against the pirates' attack.<sup>6</sup> The pirates quickly commandeered the

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1. United Nations Convention on the Law of the Sea art. 88, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

2. *Pirates Raid French Luxury Yacht*, SKY NEWS, Apr. 5, 2008, [http://news.sky.com/skynews/Home/World-News/Somalia-Pirates-Raid-French-Luxury-Yacht-Le-Ponant/Article/20080411311882?lpos=World\\_News\\_Article\\_Related\\_Content\\_Region\\_13&lid=ARTICLE\\_1311882\\_Somalia%3A\\_Pirates\\_Raid\\_French\\_Luxury\\_Yacht\\_Le\\_Ponant](http://news.sky.com/skynews/Home/World-News/Somalia-Pirates-Raid-French-Luxury-Yacht-Le-Ponant/Article/20080411311882?lpos=World_News_Article_Related_Content_Region_13&lid=ARTICLE_1311882_Somalia%3A_Pirates_Raid_French_Luxury_Yacht_Le_Ponant).

3. *See id.*

4. *Pirates used 'good conduct guide' in French yacht siege: source*, AGENCE FRANCE-PRESSE, Apr. 17, 2008, <http://afp.google.com/article/ALeqM5ic41Mhcdvj6BV5HsRB-uabBjyUmA> (hereinafter CONDUCT GUIDE).

5. *Id.*

6. *Id.*

*Le Ponant* and transferred her crew to the Somali village of Garaad-Ade in the northern Puntland region of Somalia.<sup>7</sup> There the crew was held captive for over a week.<sup>8</sup> The hostage crew was eventually released to the French navy after a two million dollar ransom was paid.<sup>9</sup> After the hostages had been released, the pirates slipped ashore and attempted to escape.<sup>10</sup> French troops pursued via helicopter and destroyed the pirates' escape vehicle.<sup>11</sup> The French helicopter assault resulted in the capture of six alleged pirates and the recovery of what was presumed to be a portion of the ransom money.<sup>12</sup> The story of the *Le Ponant* and her crew has a happier ending than most modern tales of piracy.<sup>13</sup> The demonstrative aspects of this action-packed scenario are twofold: first, it depicts the violent nature of Somalia's piracy problem, and second, it provides an example of what a country with access to Somalia's territorial waters can do to combat the epidemic of piracy.<sup>14</sup> Through Resolution 1816, the United Nations now grants its Member States the ability to lawfully follow the French example and pursue the Somali pirates into their previously protected territorial waters.<sup>15</sup> Unfortunately for those utilizing the shipping lanes along Somalia's vast coast, tactical operations against pirates are still voluntary under Resolution 1816.<sup>16</sup>

The perpetual increase in global trade has necessitated a directly proportional increase in transportation of goods across the Earth's vast oceans.<sup>17</sup>

7. *Id.*

8. *Id.*

9. *Id.*

10. See Angela Doland, *French Troops Attack Pirates after 30 Hostages Freed*, WASH. POST, Apr. 12, 2008, at A16, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/11/AR2008041103537.html>.

11. *Id.*

12. *Id.*

13. Compare Doland, *supra* note 10, with *Somali pirates kill ship crew member: maritime source*, REUTERS, June 4, 2007, <http://www.reuters.com/article/newsOne/idUSL0413318520070604> (noting that loss of life has occurred in similar situations in the past).

14. Doland, *supra* note 10; S.C. Res. 1816, ¶ 7, U.N. Doc. S / RES / 1816 (June 2, 2008) [hereinafter Resolution 1816] (noting that Resolution 1816 grants Member States the ability to enter Somalia's territorial water).

15. Resolution 1816, *supra* note 14, ¶ 7.

16. *Id.* (noting that Resolution 1816 allows countries to commit their own forces to combat an international problem, but refuses to allocate any United Nations peacekeeping forces in either a naval, or a land based strategy to prevent piracy off of Somalia's coast.).

17. See *Shipping volumes to increase 8%*, INT'L FREIGHT WK., July 23, 2008, [http://www.internationalfreightweek.com/upl\\_images/news/Shippingvolumestoincrease823July08EB.pdf](http://www.internationalfreightweek.com/upl_images/news/Shippingvolumestoincrease823July08EB.pdf); WTO Secretariat, *World Trade Report 2007, Six decades of multilateral trade cooperation: What have we learnt*, available at [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report07\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report07_e.pdf)

The international community has long recognized the need to protect this flow of trade from seafaring pirates.<sup>18</sup> It is for this reason that the recent staggering rise in piracy has captured a large amount of international attention.<sup>19</sup> The current operating environment surrounding the fight against piracy on the high seas has shifted from the eradication of swashbuckling Caribbean opportunists to the deadly struggle to protect trade routes and relief supplies from the desperate pirates of a failed state.<sup>20</sup> The traditional media inspired association of piracy with affable characters should not be inaccurately applied to the modern day pirates who prey upon the innocent.<sup>21</sup> On the west coast of Africa, Somali pirates target the shipping lanes that feed the Suez Canal and the Gulf of Aden.<sup>22</sup> These pirates are motivated by hunger and their ruthless tactics are a byproduct of the perpetual cycles of violence and strife that plague their homeland.<sup>23</sup> Luxury yachts, tug boats, food shipments and oil tanker ships have all fallen

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18. See generally UNCLOS, *supra* note 1, at art. 100; United Nations Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, opened for signature Mar. 10, 1988, 1678 U.N.T.S. 221 (1992) [hereinafter Rome Convention].

19. ICC Com. Crime Services, *Piracy figures up by 20% for first quarter of 2008*, Apr. 15, 2008, <http://www.icc-ccs.org/main/news.php?newsid=109>; See also *Piracy in waters off the coast of Somalia*, Briefing 48, Int'l Mar. Org., Nov. 24, 2005, [http://www.imo.org/Facilitation/mainframe.asp?topic\\_id=1178](http://www.imo.org/Facilitation/mainframe.asp?topic_id=1178). (noting the description of drastic recent increases in Somalia's piracy problem, and the persistent pleas for help from the IMO that, until Resolution 1816 went largely unanswered) [hereinafter IMO Briefing 48]; Helmut Tuerk, *Combating Terrorism At Sea —The Suppression Of Unlawful Acts Against The Safety Of Maritime Navigation*, 15 U. MIAMI INT'L & COMP. L. REV. 337, 338-39 (2008) (noting that since 2001, increasing numbers of nations have ratified the Rome Convention which arguably demonstrates an increase in international desire to eradicate threats to trade and stability in the forms piracy and terrorism.)

20. Compare JOHN S. BURNETT, DANGEROUS WATERS: MODERN PIRACY AND TERROR ON THE HIGH SEAS, at 9-10, Plume (2003) with *Somali pirates find booming business as nations attempt a crackdown*, N.Y. DAILY NEWS, Apr. 23, 2008, available at [http://www.nydailynews.com/news/us\\_world/2008/04/23/2008-04-23\\_somali\\_pirates\\_find\\_booming\\_business\\_as\\_.html](http://www.nydailynews.com/news/us_world/2008/04/23/2008-04-23_somali_pirates_find_booming_business_as_.html) [hereinafter *Booming Business*].

21. Compare BURNETT, *supra* note 20 at 9-10, with *Booming Business*, *supra* note 20.

22. See Michael A. Becker, *International Law of the Sea*, 42 INT'L LAW. 797, 808 (2008) (noting the attacks off of Somalia's coast on World Food Programme (WFP) aid shipments); Xan Rice, *UN authorises navies to tackle Somali pirates*, GUARDIAN NEWS, June 3, 2008, <http://www.guardian.co.uk/world/2008/jun/03/unitednations.somalia> (noting the geographic location of attacks).

23. See *Hunger and Terror*, THE ECONOMIST, Sept. 4, 2008, available at [http://www.economist.com/world/mideast-africa/displaystory.cfm?story\\_id=12059342&fsrc=rss](http://www.economist.com/world/mideast-africa/displaystory.cfm?story_id=12059342&fsrc=rss); *Somalia*, THE ECONOMIST, Dec. 18, 2008, available at [http://www.economist.com/background/displayBackground.cfm?story\\_id=12059342](http://www.economist.com/background/displayBackground.cfm?story_id=12059342) (noting how the last two decades have been both violent and turbulent for Somalia and its people).

victim to the violent acts of Somali pirates.<sup>24</sup> In some instances, pirates have even attacked and commandeered aid shipments bound for their countrymen.<sup>25</sup> Unfortunately most, if not all, Indian Ocean sea traffic en route to, or leaving from, the Mediterranean Sea must come within reach of the Somali coastline.<sup>26</sup>

Globally, pirates typically choose their targets based on regional influences.<sup>27</sup> While pirates near Nairobi focus on the oil trade, their counterparts in South Africa aim to appropriate and resell the cargo of merchant vessels.<sup>28</sup> The Somali pirates do not discriminate in their selection of targets, but their main goal appears to be the lucrative ransoms that their hostages often bring.<sup>29</sup> During the first six months of 2008, over ninety-four individuals had been taken hostage by Somali pirates.<sup>30</sup> Interestingly, there is evidence that some pirates operate by a code of conduct when engaging in their hostage-taking pursuits.<sup>31</sup> In the police investigation following the recovery of the *Le Ponant*, police discovered a manual of conduct which banned mistreatment or sexual abuse of captives.<sup>32</sup> The fact that the pirates care to keep their captives in the best condition possible suggests a high level of organization.<sup>33</sup>

This comment discusses Resolution 1816, the potential impact this resolution will have on Somalia's piracy problem and why more resources are necessary to eliminate piracy in the region. Section II will deal with foundational information regarding the current plight of the Somali people and how it has led to the increase in piracy which is plaguing the international community. It will also provide an accurate profile of those who engage in

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24. Ethan C. Stiles, *Reforming Current International Law to Combat Modern Sea Piracy*, 27 SUFFOLK TRANSNAT'L L. REV. 299, 301-03 (2004).

25. *Id.*

26. See Associated Press, *Foreign military aid key to curbing piracy in Somalia: maritime body*, INT'L HERALD TRIBUNE, Nov. 2, 2007, available at <http://www.iht.com/articles/ap/2007/11/02/asia/AS-GEN-Malaysia-Somalia-Piracy.php> [hereinafter *Foreign Aid*].

27. Online Recording: Nick Rankin, *Pirates Part 2* (Mar. 3, 2008) available at [http://www.bbc.co.uk/worldservice/documentaries/2008/03/080303\\_pirates\\_prog2.shtml](http://www.bbc.co.uk/worldservice/documentaries/2008/03/080303_pirates_prog2.shtml).

28. *Id.*

29. See Stiles, *supra* note 24, at 301-02; Rankin, *supra* note 27.

30. Miles Costello, *Shipping insurance cost soars with piracy surge off Somalia*, TIMES ONLINE, Sep. 11, 2008, [http://business.timesonline.co.uk/tol/business/industry\\_sectors/banking\\_and\\_finance/article4727372.ece](http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article4727372.ece).

31. Thierry Leveque, *Somali pirates tell French police of "sea militia"*, REUTERS, Apr. 17, 2008, <http://www.reuters.com/article/newsMaps/idUSL1783854020080417?pageNumber=1&virtualBrandChannel=0>.

32. *Id.*

33. *Id.*

piracy. Section III characterizes the consequences of Somali piracy and demonstrates how its effects are felt in areas such as international trade, humanitarian aid, and tourism. Section IV of this comment will describe two modern attempts by the United Nations to deal with piracy on the high seas: the United Nations Convention on the Law of the Sea (UNCLOS) and the United Nations Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome Convention). Section V will delve into Resolution 1816 and demonstrate both its strengths and its weaknesses; this comprehensive critique will expose various barriers to the reduction of piracy off Somalia's coast. Section VI follows up the discussion of Resolution 1816 with an analysis of the legal ramifications of piracy. Section VII proposes a new course, that if followed, holds promise for both securing a solution to piracy and empowering the Somali people. Section VIII concludes by proposing that while Resolution 1816 is arguably the most effective action taken to address Somali piracy, it still lacks the military commitment, mandatory requirement of action, decreased bureaucratic communication requirements, and the land based political policy necessary for viable efficacy. Ultimately, this comment will call for a bolstering of the off-shore naval approach to the eradication of piracy and a comprehensive plan to foster a legitimate and lasting governmental authority in Somalia.

## II. BACKGROUND

*"Somalia is in a primordial existence, a nasty, brutish, and short state of nature."*<sup>34</sup>

### A. Why?

An understanding of the nature and history of Somalia's internal struggles allows for an analysis of what motivates the country's pirates; once it is established why people engage in piracy, it is then possible to develop a comprehensive strategy for resolving the problem.<sup>35</sup> As a result of a 1969 coup, Somali General Muhammad Siad Barre took control of Somalia.<sup>36</sup> During the Cold War, Barre played Russia against the United States and eventually sided with the latter.<sup>37</sup> Unfortunately for the people of Somalia, this unholy alliance did nothing to improve civilian infrastructure within the country; instead the union served mainly to provide Somalia's dictator with the weapons and

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34. Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 41 (2007).

35. See generally Christian Bedford, *Piracy in Somalia: why solutions can't be found at sea*, LOOKOUT NEWSPAPER, Sep. 2, 2008, available at <http://www.lookoutnewspaper.com/archive/20080902/4.shtml>.

36. PETER LEHR & HENDRICK LEHMANN, *Somalia – Pirates' New Paradise*, in VIOLENCE AT SEA: PIRACY IN THE AGE OF GLOBAL TERRORISM 1, 8 (Peter Lehr ed., 2007).

37. *Id.*

ammunition needed to sustain his violent regime.<sup>38</sup> Domestic challenges and infighting between different Somali clans eventually led to the 1991 fall of Barre's dictatorship.<sup>39</sup> Somalia descended into anarchy and was considered by most of the developed world to be a failed state.<sup>40</sup> The local warlords who toppled the regime began a constant conflict amongst themselves.<sup>41</sup> The cost of this infighting can be tallied in the hundreds of thousands of civilian lives lost and in the nationwide destruction of infrastructure.<sup>42</sup> Multiple attempts have been made by the international community to stabilize the region and all have met with failure.<sup>43</sup> In 2006, an Islamic extremist element called the Union of Islamic Courts (UIC) destroyed the promising Somali government and the country once again settled into desperate desolation.<sup>44</sup> The sixth month period of the UIC's rule did, however, correspond to relative peace within Somalia.<sup>45</sup> The United States and other western powers accused the UIC of aiding and harboring terrorists and therefore opposed their rule in Somalia.<sup>46</sup> The most recent evolution in the downward spiral of Somalia, the 2007 Ethiopian incursion to remove the Islamic leadership in Somalia, has brought no change to the chaotic region.<sup>47</sup> Human rights violations are rampant in Somalia and the United States has continually reiterated its warnings about threats to personal safety posed by the lawlessness.<sup>48</sup>

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38. *Id.*

39. *Id.* at 9.

40. Brief for Keyse G. Jama as Amici Curiae supporting Petitioner, *Jama v. Immigration and Naturalization Service*, 535 U.S. 335 (2004) (No. 03-674), at 13 [hereinafter Brief Amici Curiae].

41. *Id.*

42. See generally Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, 89 FOR. POL'Y 3, 3, 8 (1992); *Consolidated Appeal for Somalia 2007*, United Nations Consolidated Appeal Process, Apr. 16, 2007, <http://ochaonline.un.org/cap2005/webpage.asp?Page=1565>.

43. LEHR & LEHMANN, *supra* note 36, at 8-10; James Swan, *United States Policy Somalia*, Apr. 21, 2007, available at <http://www.state.gov/p/af/rls/rm/83935.htm>.

44. See generally *TIMELINE-Chaos in Somalia*, REUTERS, June 3, 2007, <http://uk.reuters.com/article/topNews/idUKL0367271320070603?pageNumber=1&virtualBrandChannel=0>.

45. See Bedford, *supra* note 35.

46. *Id.*

47. *Country Profile: Somalia*, BBC NEWS, June 18, 2008, [http://news.bbc.co.uk/2/hi/africa/country\\_profiles/1072592.stm](http://news.bbc.co.uk/2/hi/africa/country_profiles/1072592.stm). (noting there has been little improvement in the government, infrastructure or general well being of the Somali people since the Ethiopian led incursion and also that to the contrary, confirmed incidents of piracy have skyrocketed.).

48. Swan, *supra* note 43 (noting both that the United States has significant interests in Somalia, and the implicit lack of confidence in the current state of governmental affairs in Somalia).

After the 1991 collapse of Somalia's government, the country was fractured into several different regions.<sup>49</sup> Control of each has depended largely upon military might.<sup>50</sup> Those individuals in power within these separate and distinct regions required a revenue stream to finance their militias on the ground.<sup>51</sup> Piracy and fishing have each contributed to the funding of militia operations in Somalia.<sup>52</sup> Each of these activities is corrupt in its own way.<sup>53</sup> Piracy is facially and unequivocally a criminal enterprise and therefore, synonymous with corruption.<sup>54</sup> The Somali fishing industry has been corrupted by many developing nations such as Italy, New Zealand, China and South Korea that have allegedly obtained illegal commercial fishing licenses.<sup>55</sup> The questionable sale of these licenses provides further funding for the warlords' ground forces.<sup>56</sup> Many nations continue to fish in Somalia's waters without obtaining a license; the presence of these illegal fishing vessels is then used to justify the presence of "Maritime Militias" who work for the warlords under the auspices of ensuring only properly licensed fishing vessels are allowed to operate off the coast.<sup>57</sup> This civic duty is considered necessary by some in order to protect one of the few viable industries in Somalia but has in all likelihood been perverted into what is now the current Somali piracy industry.<sup>58</sup> In sum, the violent history of Somalia and its people, combined with a near limitless supply of military

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49. LEHR & LEHMANN, *supra* note 36, at 9.

50. See generally *The fragmentation of Somalia*, THE ECONOMIST, Oct. 4, 2007, [http://www.economist.com/world/mideast-africa/displaystory.cfm?story\\_id=9914899](http://www.economist.com/world/mideast-africa/displaystory.cfm?story_id=9914899).

51. See generally LEHR & LEHMANN, *supra* note 36, at 9-11.

52. Daniel Wallis, *Piracy ransoms funding Somalia insurgency*, REUTERS, Aug. 24, 2008, <http://www.reuters.com/article/reutersEdge/idUSLO00572320080824?pageNumber=1&virtualBrandChannel=0>; see also Jeffery Gettleman, *Somali Pirates Tell Their Side: They Want Only Money*, THE NEW YORK TIMES, Oct. 1, 2008, available at [http://www.nytimes.com/2008/10/01/world/africa/01pirates.html?\\_r=1&hp&oref=slogin](http://www.nytimes.com/2008/10/01/world/africa/01pirates.html?_r=1&hp&oref=slogin) (taking note that fishing in Somalia evolved into piracy, thus corrupting the fishing trade and indirectly bringing about the funding of the Somali warlords. These same warlords then fund pirate organizations under the auspices of protecting Somali territorial waters from unauthorized foreign fishing vessels.).

53. See generally Wallis, *supra* note 54; Gettleman, *supra* note 54.

54. See UNCLOS, *supra* note 1, at art. 111; Rome Convention, *supra* note 18 (noting the definition of piracy and making clear that it is a criminal act).

55. LEHR & LEHMANN, *supra* note 36, at 12-13; see generally Bedford, *supra* note 35.

56. See generally Bedford, *supra* note 35.

57. *Id.*; Gettleman, *supra* note 52; Xan Rice, *How savage pirates reign on the world's seas*, THE OBSERVER, Apr. 27, 2008, <http://www.guardian.co.uk/world/2008/apr/27/somalia1>.

58. Bedford, *supra* note 35.



hardware and a lack of viable employment opportunities, has created an environment fraught with the desperation needed for fostering piracy.<sup>59</sup>

In order for piracy to be lucrative and have a low potential for capture, there must be an "enabling environment."<sup>60</sup> Throughout history, and currently in parts of Asia, this environment translates into one which facilitates an easy exit strategy.<sup>61</sup> In other words, the topography of the land is such that pirates may conduct their intended acts only to flee and find readily available shelter from authorities.<sup>62</sup> Somalia's long coastline provides little in the way of cover and concealment, but the lack of any central government authority or any Somali naval force to patrol its territorial waters, effectively creates the necessary "enabling environment" which serves as an incubator for the growing problem of piracy.<sup>63</sup> These factors, combined with the legal inability of those nations with tactical naval assets to travel into Somali territorial waters, has afforded the pirates the ability to operate with impunity; that is until the passage of Resolution 1816.<sup>64</sup>

### B. Profiles in Piracy

Somali piracy originally lacked structure and technology, but as piracy's profitability rose, so too did the organization and arsenal of the pirates.<sup>65</sup> It is believed that after the 1991 fall of Somalia's government, the first acts of piracy were committed by Somali fisherman who became angry at foreigners illegally fishing in Somali territorial waters.<sup>66</sup> The Somali fisherman would accost the foreigners and demand a payment.<sup>67</sup> These attacks, more often than not, involved knives rather than automatic weapons and occurred very close to the shore.<sup>68</sup> Presently, the pirates' tactical operations have evolved to the point of using a large vessel, or "mother-ship," as a base of operations.<sup>69</sup> From this locus

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59. See generally Bureau of Democracy, Human Rights and Labor, *Country Report on Human Rights Practices*, UNITED STATES DEPARTMENT OF STATE, Mar. 11, 2008, <http://www.state.gov/g/drl/rls/hrrpt/2007/100504.htm>.

60. LEHR & LEHMANN, *supra* note 36, at 11.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Chip Cummins, *Piracy Grips Gulf of Aden*, WALL ST. J., Sep. 8, 2008, available at [http://online.wsj.com/article/SB122083029536208391.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB122083029536208391.html?mod=googlenews_wsj).

66. LEHR & LEHMANN, *supra* note 36, at 12-13; Rob Crilly, *Somalia: Only guns can get aid past the pirates into the gates of Hell*, TIMES ONLINE, Sept. 20, 2008, <http://www.timesonline.co.uk/tol/news/world/asia/article4791081.ece>.

67. LEHR & LEHMANN, *supra* note 36, at 12-13; Crilly, *supra* note 66.

68. LEHR & LEHMANN, *supra* note 36, at 16.

69. *Booming Business*, *supra* note 20.

of control, smaller craft are dispersed in search of targets, ostensibly creating search quadrants with their GPS equipment and coordinating their attack with satellite telephones.<sup>70</sup> The pirate activities, which were once confined to a few miles from the shoreline, now range out hundreds of miles bringing the international trade routes within striking distance.<sup>71</sup> Once the pirates' prey is within range of small arms, they begin indiscriminately firing Kalashnikov assault rifles, popularly referred to as "AK-47's," and rocket propelled grenades in the general vicinity of their target vessel.<sup>72</sup> The unarmed merchant vessels that frequent the shipping lanes near Somalia are the workhorses of the sea and are not built for speed.<sup>73</sup> Therefore, the victims have little choice but to stop and succumb to the pirates' will.<sup>74</sup> Typically, the pirates will then transfer the merchant ship's crew to a village within Somalia and subsequently make the initial contact in what will become lengthy ransom negotiations.<sup>75</sup>

Somali pirates are well armed and, as a byproduct of decades of violence within their homeland, overly qualified for their violent profession.<sup>76</sup> The profits from years of piracy are more than adequate to procure the lethal weapon systems used by the pirates.<sup>77</sup> Even if pirate operations in Somalia were undercapitalized, which they are not, their nation is awash in an "ocean of guns" because of the last seventeen years of conflict within the country.<sup>78</sup> These militias have become progressively more organized.<sup>79</sup> A particularly notorious example of highly dangerous and organized Somali pirates are the centrally located "Somali Marines," who are equipped with indirect fire artillery pieces and global positioning system components used to track and isolate their targets.<sup>80</sup> The individual pirates who fill the ranks of Somalia's pirate crews are

70. Gillan, *supra* note 5.

71. LEHR & LEHMANN, *supra* note 36, at 16.

72. Gillan, *supra* note 5.

73. BURNETT, *supra* note 20 at 12.

74. *See generally* Gillan, *supra* note 5.

75. LEHR & LEHMANN, *supra* note 36, at 3.

76. *See* Associated Press, *Everyone in Somalia's capital has a gun - except the police*, INT'L HAROLD TRIBUNE, Jan. 3, 2008, [http://www.iht.com/articles/ap/2007/01/04/africa/AF\\_GEN\\_Somalia\\_Weapons.php?page=1](http://www.iht.com/articles/ap/2007/01/04/africa/AF_GEN_Somalia_Weapons.php?page=1) [hereinafter *Everyone in Somalia's Capital*]; Bahar, *supra* note 34, at 3 (noting the initial description of the Pirate's armament).

77. *See* Kirit Radia & Luis Martinez, *U.S. Navy Surrounds Hijacked Ship off Somali Coast*, ABC NEWS, Sep. 29, 2008, <http://abcnews.go.com/International/Story?id=5913014&page=1> (noting that the average ransom as of 2008 was over \$500,000).

78. *See* *Everyone in Somalia's Capital*, *supra* note 76.

79. *See* Matteo Fagotto, *Africa's Buccaneers: Piracy thrives in the no man's land of Somalian [sic] waters*, May 14, 2007, available at [http://www.peacereporter.net/dettaglio\\_articolo.php?idc=0&idart=7944](http://www.peacereporter.net/dettaglio_articolo.php?idc=0&idart=7944).

80. *Id.*

sometimes trained fighters who honed their skills during the last two decades of brutal conflict in their nation; other pirates are merely youths working their way up the ladder of a criminal organization, feeding portions of their ransom money to those above them.<sup>81</sup> These organizational evolutions display a degree of sophistication that pirates lacked in the past.<sup>82</sup>

In addition to automatic weapons, fast moving boats, and satellite telephones, Somali pirates also possess the less tangible but equally formidable asset of cavalier attitudes.<sup>83</sup> When asked about the presence of foreign military within Somalia's territorial waters, a Somali pirate replied, "[w]e are not scared of the U.S. troops or any other troops stationed off our waters. Why should we be scared? . . . They have weapons, but so do we. And we are the ones with the human shields."<sup>84</sup> This opinion, while disturbing to a western audience, accurately describes an attribute of any peacekeeping force: its hesitancy to cause collateral damage in the form of innocent lives.<sup>85</sup>

It has been reported that within the last two years the ranks of Somali pirates have blossomed from a modest 100, to a force of well over 1,000.<sup>86</sup> In the Puntland region on the horn of Africa, the town of Eyl has exploded with wealth derived from piracy.<sup>87</sup> Somali pirates grossed over thirty million U.S. dollars in ransom money in 2008 alone.<sup>88</sup> Whenever word arrives in Eyl that the pirates have taken hostages the town springs to life.<sup>89</sup> An entire support industry has developed to facilitate the Somali pirates; there are accountants, negotiators, and even hospitality workers who care for those taken hostage by the pirates.<sup>90</sup>

81. *Booming Business*, *supra* note 20.

82. *See* Cummins, *supra* note 65.

83. *Booming Business*, *supra* note 20.

84. *Id.*

85. *See generally* United Nations Charter- Preamble,

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, . . . to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, . . . HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS.

(noting that the first article of the Charter says that the purpose of the UN is to "maintain international peace and security" and therefore that the purpose of the United Nations to ensure the preservation of life and that therefore it is intuitive to expect any United Nations peacekeeping force to hesitate at taking such life.)

86. *Crilly*, *supra* note 66.

87. Marcy Harper, *Life in Somalia's Pirate Town*, BBC NEWS, Sep. 18, 2008, <http://news.bbc.co.uk/2/hi/africa/7623329.stm>. (noting that pirates are now able to construct new homes, drive expensive vehicles and have even established restaurants to provide food for their wealthy hostages).

88. *Id.*

89. *Id.*

90. *Id.*

*C. The Obfuscated Line between Piracy and Terrorism*

“Terrorism is not just about killing people.”<sup>91</sup> The subjective intentions of those who would do violence upon the high seas are largely irrelevant in terms of assessing whether or not such actions constitute piracy.<sup>92</sup> Current international law defines piracy as, “any illegal acts of violence or detention . . . committed for private ends by the crew or the passengers of a private ship . . . .”<sup>93</sup> Arguments have been made as to the proper interpretation of the term of art “private ends” included in this definition, but the same substantive result has always been reached.<sup>94</sup> This result dictates that the intent of the party committing the alleged act of piracy must be analyzed only so far as to ensure the conduct was not one of mistake or accident.<sup>95</sup> This broad definition of piracy easily encompasses acts which would otherwise be recognized as terrorism.<sup>96</sup>

Due to the ever present threat of terrorism at home and abroad for many western nations, acts of piracy may quickly become synonymous with acts of terror.<sup>97</sup> According to a Somali government official, Osama bin Laden “is strongly involved in some areas in Somalia” and has multiple possible militant training bases; the United States also firmly insists that a Somali militia is harboring those terrorists responsible for the 1998 embassy bombings in Kenya and Tanzania.<sup>98</sup> The ransoms derived from kidnapping, or the weapons hijacked at sea, may conceivably end up in the hands of terrorists focused on bringing harm to the western world.<sup>99</sup> It is noteworthy that a group of “pirates” under the aforementioned definition may be acting not for tangible profit but instead for an intangible spiritual or political belief that harming a particular nation’s citizens or assets will advance their own interests.<sup>100</sup>

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91. SAM BATEMAN, *Outlook: The New Threat of Maritime Terrorism*, in *VIOLENCE AT SEA: PIRACY IN THE AGE OF GLOBAL TERRORISM* 244 (Peter Lehr ed., 2007).

92. See UNCLOS, *supra* note 1, at art. 101; Rome Convention, *supra* note 18 (noting that neither definition requires an investigation into the motivations behind the act of piracy, merely proof that such an act did in fact take place).

93. UNCLOS, *supra* note 1, at art. 101.

94. Bahar, *supra* note 34, at 28-33.

95. *Id.* at 33.

96. UNCLOS, *supra* note 1, at art. 101.

97. See generally BATEMAN, *supra* note 91.

98. Bahar, *supra* note 34, at 28; Associated Press, *International flotilla to fight Somali pirates*, MSNBC, Oct. 16, 2008, <http://www.msnbc.msn.com/id/27226220/>.

99. See generally Nick Wadhams, *The Somali Pirates: Tanks, but no Tanks*, TIME, Oct. 9, 2008, available at <http://www.time.com/time/world/article/0,8599,1848772,00.html>.

100. ROMMEL C. BANLAOI, *The Abu Sayyaf Group: Threat of Maritime Piracy and Terrorism*, in *VIOLENCE AT SEA: PIRACY IN THE AGE OF GLOBAL TERRORISM* 121, 122 (Peter Lehr ed., 2007).

This overlap between piracy and terrorism could easily be capitalized upon by the international community.<sup>101</sup> A multilateral naval force could be further justified to an already war-weary world populace as necessary not only for the protection of trade but also for the prevention of terror.<sup>102</sup> A classification of international involvement in Somalia as a fight against terrorism would help capture the attention of many who would otherwise be distracted by the far more prominent ongoing struggles in Africa.<sup>103</sup> Ultimately, care must be taken when applying the “terrorist” label to Somali piracy operations.<sup>104</sup> In making the argument that a fight against piracy is a fight against terrorism, one adopts an approach to combating terrorism that might later be viewed as a misguided attempt to secure funding and support for a myopic strategy of eliminating Somali piracy through tactical supremacy.<sup>105</sup> While there are plausible and probable links between Somali piracy and Somali terrorism, (whether it be land or maritime based terrorism) there is very little evidence to support any direct connection between the two.<sup>106</sup>

### III. CONSEQUENCES OF PIRACY

#### *A. International Trade and Other Targets of Opportunity*

Ninety percent of international trade is carried out over the oceans.<sup>107</sup> Within those oceans, approximately 30,000 ships per year travel along trade routes which put them within striking distance of Somalia’s chaotic coastline.<sup>108</sup> Many of these ships are transporting the lifeblood of every industrialized nation on the planet—oil.<sup>109</sup> Somali pirates have become predominately engaged in the

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101. See LEHR & LEHMANN, *supra* note 36, at 18 (noting that CTF-150’s main purpose is combating terrorism near the horn of Africa, but that his mission could easily be expanded to encompass the fight against piracy).

102. See *id.*; U.S. Naval Forces Central Command News Release No. 226-07, *UPDATE: Crew of North Korean Pirated Vessel Safe*, Oct. 30, 2007, available at <http://www.cusnc.navy.mil/articles/2007/226.html> (noting that NATO already has a naval force in the region and operates to suppress terrorism. Additional or supplemental NATO or UN naval forces could enable further suppression of terrorism and potentially eradicate Somali piracy) [hereinafter *UPDATE*].

103. Bedford, *supra* note 35.

104. See generally LEHR & LEHMANN, *supra* note 36, at 16.

105. See generally *id.*

106. *Id.*

107. Rankin, *supra* note 27; International Chamber of Shipping, Overview <http://www.marisec.org/shippingfacts/worldtrade/index.php?SID=133efdcbc315d26f88826fbb528dd54d>.

108. Crilly, *supra* note 66.

109. BURNETT, *supra* note 20, at 10-12.

kidnapping and ransom business.<sup>110</sup> Therefore, it is not beyond the realm of possibility that they might take the crew of an oil tanker hostage and set the vessel adrift without any concern for what is in the ship's cargo holds.<sup>111</sup> An event such as this would deal a devastating blow to international trade if an oil carrying ship had a collision and spilled forth hundreds of thousands of gallons of oil into the sea.<sup>112</sup> An environmental disaster of this magnitude would likely close the crucial economic artery of the Suez Canal.<sup>113</sup> An oil spill is a dramatic example, but the sinking of any large ship in the approach route to the canal would have the same effect.<sup>114</sup> This type of blockage would strangle crucial economies in the world that are unable to produce their own oil or any other good shipped through the affected area.<sup>115</sup>

The recent surge in pirate attacks has corresponded to increases in transportation costs due to merchant vessels having to travel farther out from Somalia's coast in order to avoid potential pirate attacks.<sup>116</sup> In some instances, international freight companies have even begun to refuse to travel routes which bring them within the reach of Somali pirates.<sup>117</sup> As the frequency of attacks has increased, the shipping companies have realized a ten fold increase in the cost of insurance for vessels traveling near the Gulf of Aden.<sup>118</sup> Another expense that ship owners and merchants must now account for is the very real possibility of having to pay exorbitant ransoms for their personnel and property; it appears that as pirates have become more successful they have adopted a gradually increasing monetary schedule for ransom demands.<sup>119</sup>

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110. Alexis Masciarelli, *Somalia's kidnapping industry*, BRIT. BROAD. CORP., May 24, 2002, <http://news.bbc.co.uk/1/hi/world/africa/2005567.stm>.

111. BURNETT, *supra* note 20 at 10- 12.

112. *See id.*

113. *Id.*

114. *International flotilla to fight Somali pirates*, *supra* note 98.

115. BURNETT, *supra* note 20, at 11.

116. Costello, *supra* note 30; Sana Aftab Khan, *Tackling Piracy in Somali Waters: Rising attacks impede delivery of humanitarian assistance*, UN CHRONICLE ONLINE ED., 2006, [http://www.un.org/Pubs/chronicle/2007/webArticles/073107\\_somalia.htm](http://www.un.org/Pubs/chronicle/2007/webArticles/073107_somalia.htm); *International flotilla to fight Somali pirates*, *supra* note 98.

117. Mark Watts, *Chemical shippers urge action over Somalia piracy*, ICIS NEWS, Sep. 19, 2008, <http://www.icis.com/Articles/2008/09/19/9157460/chemical-shippers-urge-action-over-somalia-piracy.html>.

118. *Crilly*, *supra* note 66 (noting the specific insurance figures that increased within the last year from \$900 to \$9,000).

119. *Id.*

### B. Humanitarian Aid

The last several years have seen a drastic increase in attacks upon humanitarian aid shipments.<sup>120</sup> So much so that maritime aid transporters have begun to refuse to travel through Somalia's lawless waters.<sup>121</sup> The lack of a central government and unavailability of basic human services necessitate the need for extrinsic aid in order for the vast majority of Somalis to survive.<sup>122</sup> This precipitous situation is compounded by several negative environmental and social factors currently impacting the citizens of Somalia.<sup>123</sup> Malnutrition is on the rise in the war ravaged nation due to the uncharacteristically dry conditions which have further devastated the already meager farming industry.<sup>124</sup> In 2007, the World Food Programme (WFP) director stated that a recent pirate attack, "underscore[d] the growing problem of piracy off Somalia which, if unresolved, will sever the main artery of food assistance to the country and to the people who rely on it for their survival."<sup>125</sup> In response to this declaration, an armed naval escort program was initiated by France, Denmark, and the Netherlands for all food shipments entering Somalia.<sup>126</sup> All recent aid shipments that have managed to arrive unscathed, did so only through the use of heavily armed naval escorts.<sup>127</sup> Unfortunately, this escort arrangement expired on June 25th, 2008, and has left the WFP clamoring for escorts for its food shipments.<sup>128</sup> As the agreement expired, the WFP announced that two million Somali citizens might starve if the nations of the world failed to provide adequate naval security for its shipments into Somalia.<sup>129</sup>

120. See UN News Centre, *UN food agency appeals for naval escorts for shipments to Somalia*, Jun. 12, 2008, <http://www.un.org/apps/news/story.asp?NewsID=26995&Cr=Somali&Cr1=piracy> (noting that 80% of the WFP shipments arrive by sea) [hereinafter *UN food agency*].

121. BBC News, *Pirates halt Somali aid shipments*, May 21, 2007, <http://news.bbc.co.uk/2/hi/africa/6675117.stm>; see also *UN food agency*, *supra* note 120.

122. World Food Programme, *WFP News Release: More Naval Escorts Needed for WFP Food Ships to Somalia*, June 12, 2008, 122. World Food Programme, *WFP News Release: More Naval Escorts Needed for WFP Food Ships to Somalia*, June 12, 2008, <http://documents.wfp.org/stellent/groups/public/documents/newsroom/wfp180678.pdf>

123. *Id.*

124. *UN food agency*, *supra* note 120.

125. *Pirates Halt Somali Aid Shipments*, *supra* note 121; *UN food agency*, *supra* note 120.

126. See *Piracy threatens Somali food emergency shipments*, AFROL NEWS, June 12, 2008, <http://www.afrol.com/articles/29332>.

127. Crilly, *supra* note 66.

128. *Piracy threatens Somali food emergency shipments*, *supra* note 120.

129. Press Release, World Food Programme, *More Naval Escorts Needed for WFP Food Ships to Somalia*, June 12, 2008, *available at* <http://documents.wfp.org/stellent/groups/public/documents/newsroom/wfp180678.pdf> (noting the relevant part of the release:

In addition to the aforementioned cost increases in insurance and transportation of merchandise, the possibility of millions of human beings starving because of the violent actions of a relatively small number of pirates, is moving from mere possibility to actual probability.<sup>130</sup> Resolution 1816 does not directly make provisions for ensuring the continuity of aid shipments.<sup>131</sup> However, if achieved, Resolution 1816's overall goal of suppressing piracy would effectively pave the way for aid shipments to arrive with ease.<sup>132</sup> Assuming *arguendo* that the international community desires to aid those Somalis dangerously close to starvation, it would intuitively follow that the same community should strive to cure the defects in Resolution 1816's noteworthy, but imperfect attempt to stem the tide of Somali piracy.<sup>133</sup> Another aspect to piracy with respect to humanitarian aid is that part of the motivation to engage in piracy may be attributed in part to the desperation brought about by poverty and

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The United Nations World Food Programme (WFP) appealed today to naval powers to help protect its ships carrying life-saving assistance from pirate attacks, saying that as many as 2 million Somalis could go hungry without this essential help.

A Dutch frigate is scheduled to finish escort services for WFP on June 25. Since the escort system started last November, no WFP ships have been targeted by pirates, despite an upsurge of piracy in Somali waters—31 attacks so far this year according to the International Maritime Bureau.

“Without escorts, our whole maritime supply route will be threatened,” said WFP Country, Director Peter Goossens. “Shipping companies are reluctant to sail unescorted to Somalia, and we have no offers to take over from the Royal Netherlands Navy.”

“Millions of Somalis are suffering from a combination of insecurity, drought and high food and fuel prices. If relief shipments slow down, we could face a major catastrophe,” said Goossens, adding that WFP is trying to scale up relief food distributions to avoid a disaster.

Malnutrition is on the rise in Somalia. An unusually harsh dry season and poor April-June rains, which followed a succession of droughts and poor harvests, have led to increasing hunger in central Somalia.)

[hereinafter WFP Press Release].

130. See WFP Press Release, *supra* note 129; *UN food agency, supra* note 120.

131. Resolution 1816, *supra* note 14, at 2-3.

132. See generally WFP Press Release, *supra* note 129 (drawing the conclusion that because the WFP requested help to protect humanitarian aid shipments from pirates, such help would be unnecessary if there was no potential for violent acts of piracy).

133. See generally *UN food agency, supra* note 120 (showing the international community, specifically France, Denmark, and the Netherlands have stepped in to assist Somalia in receiving humanitarian aid shipments); Resolution 1816, *supra* note 14, at 2-3 (noting that no naval assets were pledged to fight piracy off of Somalia's coast, to serve as peacekeepers in a land based attempt to restore governmental function, or to safeguard any incoming aid shipments).



starvation.<sup>134</sup> In one documented instance, several pirates who were captured after attempting to hijack a vessel revealed the details of the days leading up to their attempted attack, “[p]rior to their attack . . . they were in an open boat for fifteen days on the seas, rationing infested rice, and taking turns nibbling away on the remains of a shark.”<sup>135</sup> Ironically, it may well be the Somali pirates’ hunger which provides the basis for their piracy against the very food shipments intended to provide them with sustenance.<sup>136</sup>

### C. *Tourism Industry*

The saga of the luxury yacht *Le Ponant* is a good example of the potential vacation that awaits tourists attempting a passage from the Indian Ocean to the Mediterranean Sea.<sup>137</sup> Another incident occurred in early 2008, when a French couple traveling in a private yacht were hijacked, transferred deep into the mountains of Somalia, ransomed and later released.<sup>138</sup> Pirates sometimes parlay the capture of luxury yachts such as these into realistic decoy vessels that are later used to lure and capture other unsuspecting targets.<sup>139</sup> Cruise ships have been the targets of pirates on more than one occasion.<sup>140</sup> The operators of these luxury liners have even gone so far as to employ sonic weaponry to repel pirates.<sup>141</sup> While the \$30,000 price tag for this piece of equipment is negligible relative to the value of a cruise ship, it is arguably unfortunate for such a precaution to even be necessary.<sup>142</sup> Far more reasonable is the expectation that the international community should act in concert to create laws that remove the threat of piracy and subsequently enforce those laws without trepidation.<sup>143</sup> The

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134. See generally *UN food agency*, *supra* note 120 (suggesting that perhaps even pirates are affected by the trying times in Somalia).

135. Bahar, *supra* note 34, at 41.

136. *Id.*

137. See Pierre-Yves Roger, *Pirates Swarm onto French luxury yacht off coast of lawless Somalia, seizing 30 crew members*, INT'L HAROLD TRIB, Apr. 4, 2008, available at <http://www.iht.com/articles/ap/2008/04/04/news/Somalia-Pirate-Attack.php>.

138. Costello, *supra* note 30.

139. *Id.*

140. See Adam Blenford, *Cruise Lines turn to sonic weapon*, BBC NEWS, Nov. 8, 2005, available at <http://news.bbc.co.uk/2/hi/africa/4418748.stm>; Roger, *supra* note 137 (noting that both ships were luxury cruise ships).

141. Blenford, *supra* note 140.

142. Compare Blenford, *supra* note 140, with Associated Press, *Royal Caribbean Orders \$1.24B Cruise Ship*, CBS NEWS, Feb. 6, 2006, available at <http://www.cbsnews.com/stories/2006/02/06/ap/business/mainD8FJQAOO1.shtml>.

143. See U.N. Charter preamble (noting that the U.N. was formed, in part, to preserve and promote peace).

ripple effects of Somalia's piracy epidemic are affecting both the starving poor and the vacationing wealthy.<sup>144</sup>

#### IV. LEGAL RAMIFICATIONS OF PIRACY

*"Pirata est hostis humani generis" – Pirates are the enemies of all mankind*<sup>145</sup>

It is important to note that the fight against piracy continues long after any tactical, naval, or military operations have concluded.<sup>146</sup> Unfortunately, the United Nations' first modern attempt to curb piracy, the United Nations Convention on the Law of the Sea (UNCLOS), lacked any prescription or mandate for legal proceedings involving pirates captured by Member States.<sup>147</sup> After a terrorist attack on a passenger ship named the *Achille Lauro*, which resulted in the death of an American citizen, Italy denied the United States' extradition requests for the terrorists involved.<sup>148</sup> The hijacking of the *Achille Lauro* was perpetrated by four Palestinian terrorists with the hope of obtaining the release of prisoners from Israeli custody.<sup>149</sup> The jurisdictional overlaps regarding the facts of the *Achille Lauro* incident helped highlight the need for the changes brought about by the Rome Convention.<sup>150</sup> The Rome Convention established a jurisdictional hierarchy that eliminated much of the gray area discovered in the aftermath of the *Achille Lauro* incident.<sup>151</sup> In particular, the Rome Convention comprehensively detailed extradition procedures and attempted to address any future complications that might arise between its signatory states.<sup>152</sup>

A jurisdictional gap exists between such documents as UNCLOS and the Rome Convention and the practical aspects of pursuing a prosecution against

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144. Compare Roger, *supra* note 137 with UN food agency, *supra* note 120.

145. Bahar, *supra* note 34, at 11.

146. See generally UNCLOS, *supra* note 1; see also Rome Convention, *supra* note 18 (observing that both documents provide a framework for bringing those accused of acts of piracy to justice).

147. See generally UNCLOS, *supra* note 1, at art. 100-11.

148. Niclas Dahlvang, *Thieves Robbers, & Terrorists: Piracy in the 21st Century*, 4 REGENT J. INT'L L. 17, 26 (2006).

149. Tuerk, *supra* note 19, at 338.

150. Dahlvang, *supra* note 148, at 27-28 (taking note that because an American citizen was executed during the hijacking the United States had a valid jurisdictional claim to the terrorists/pirates; conversely, the Italians also had a valid means of exercising jurisdiction because the *Achille Lauro* was an Italian flagged vessel. The Rome Conventions attempted to resolve jurisdictional disputes such as this that arose under the penumbra surrounding UNCLOS's choice of language, as well as to combat piracy, terrorism, and violence on the high seas.)

151. See generally Rome Convention, *supra* note 18, at art. 7-11.

152. *Id.* at art. 11.

alleged pirates.<sup>153</sup> This divide has formed because both UNCLOS and the Rome Convention apply between nations that are a party to the treaties, but in theory have no application to those who are not citizens of a ratifying party.<sup>154</sup> Unfortunately, individuals engaging in acts of piracy, by definition, must be acting independent from any nation.<sup>155</sup> This issue has historically been addressed by the doctrine of universal jurisdiction.<sup>156</sup> Pursuant to this legal theory, any person who meets the internationally accepted definition of a pirate may be prosecuted to the fullest extent permitted by any nation, based on that nation's anti-piracy laws.<sup>157</sup> The fact that the international community has long held piracy to be a crime committed "against the nations of the world" lends further support to the extension of jurisdiction pursuant to the doctrine of universal jurisdiction.<sup>158</sup>

The pirates of old began as mercenaries for hire, advancing the wartime interests of whichever European nation paid their salaries.<sup>159</sup> As the wars abated, the mercenaries continued the violent lifestyles to which they had become accustomed.<sup>160</sup> The European nations who had previously supported these mercenaries turned pirates were forced to develop the doctrine of universal jurisdiction to efficiently deal with the new threat posed by these pirates to trade routes with the New World.<sup>161</sup>

Despite the age and origins of universal jurisdiction, it is still applicable to modern day pirates.<sup>162</sup> The Restatement 3rd of Foreign Relations Law provides a framework for international jurisdiction, "[a] state has jurisdiction to define

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153. Bahar, *supra* note 34, at 11-13.

154. *Id.*

155. *Id.*

156. *Id.* at 11.

157. *Id.* (noting:

Under international law, any person who fits the international definition of a pirate can be prosecuted by any state, based on that state's own anti-piracy laws. Piracy, in fact, is the oldest offense that invokes this powerful jurisdictional brand, dating back as far as the sixteenth century. Even before there was such a thing as "international law" in the modern sense, pirates were considered *hostis humani generis*—enemies of all mankind. The English Act of Henry VIII of 1516 extended the jurisdiction of the Crown to pirates. In 1615, British courts determined "pirata est hostis humani generic." In 1822, a U.S. federal judge wrote that, "[N]o one can doubt that vessels and property in the possession of pirates may be lawfully seized on the high seas by any persons, and brought in for adjudication.)

158. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404, reporter's note 1 (1987).

159. Bahar, *supra* note 34, at 12.

160. *Id.*

161. *Id.*

162. Bahar, *supra* note 34.

and prescribe punishment for certain offenses recognized by the community of nations as of a universal concern, such as piracy . . . [and] hijacking . . . .”<sup>163</sup> UNCLOS invokes universal jurisdiction in Article 105 by granting the courts of Member States the statutory authority to dispense justice to captured pirates.<sup>164</sup> Universal jurisdiction is implicit in the Rome Convention’s requirement that signatory states prosecute the alleged pirates “without delay” and apply punishment to those adjudicated to be guilty of any listed offense in the same manner as they would similar offenses of a “grave nature.”<sup>165</sup> Many nations base their anti-piracy statutes on international law such as UNCLOS.<sup>166</sup> The United States for example, prescribes a life imprisonment penalty for any person found guilty of piracy under international law.<sup>167</sup>

## V. MODERN ATTEMPTS TO REPRESS PIRACY ON THE HIGH SEAS

### A. *United Nations Convention on the Law of the Sea*

The modern version of the United Nation’s omnibus regulation of the oceans, to include piracy, is UNCLOS.<sup>168</sup>

Any reasonable observer will recognize that the United Nations Convention on the Law of the Sea is a remarkable achievement. It has established a legal framework for two-thirds of the Earth’s surface; what some have called “a constitution for the oceans.” However, no human act is perfect. Each bears the marks of its maker and the time of its gestation. Treaties are not immune from this law and UNCLOS is no exception.<sup>169</sup>

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163. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

164. UNCLOS, *supra* note 1, at art. 105 (noting:

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

165. Stiles, *supra* note 24, at 311.

166. See generally Bahar, *supra* note 34.

167. 18 U.S.C.1651 (1948).

168. UNCLOS, *supra* note 1.

169. Martin Murphy, *Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?*, in *VIOLENCE AT SEA: PIRACY IN THE AGE OF GLOBAL TERRORISM* 155 (Peter Lehr ed., 2007).

The path to adoption for UNCLOS took well over a decade.<sup>170</sup> This document was originally promulgated during 1958 as the Convention on the High Seas, but was later used to create the larger regulatory work of UNCLOS, the text of which was completed in 1982 but did not come into force until 1994.<sup>171</sup> The reason for the twelve-year gap is that the treaty required sixty nations to ratify it.<sup>172</sup> The United States was one of the key promoters and drafters of UNCLOS, but to this day, the Senate has not ratified the document because of political pressure unrelated to the piracy clauses within UNCLOS.<sup>173</sup>

UNCLOS defines piracy as “any illegal acts of violence or detention, committed for private ends by the crew or passengers of a private ship” and addresses the problem in part by mandating that “[a]ll states shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”<sup>174</sup> UNCLOS allows for the interdiction of piracy on the high seas, within a nation’s sovereign territorial waters and within a further 200 miles out to sea in what is termed that country’s “Exclusive Economic Zone.”<sup>175</sup>

A noteworthy aspect to UNCLOS is that it provides law enforcement or military units the option to engage in “hot pursuit” of suspected pirates.<sup>176</sup> UNCLOS specifies that hot pursuit should only be engaged in by warships or other clearly identified governmental craft and only in situations where the

170. See Jason C. Nelson, *The Contemporary Seabed Mining Regime: A Critical Analysis of the Mining Regulations Promulgated by the International Seabed Authority*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 27, 29 (2005) (discussing the history of UNCLOS).

171. Stiles, *supra* note 24, at 307-08.

172. Nelson, *supra* note 170, at 32.

173. *Id.* (noting that only the clauses pertaining to seabed mining were offensive to the Reagan administration and were all that initially prevented the signing of the document. All that remains for the convention to become binding on the United States is ratification by the Senate.).

174. UNCLOS, *supra* note 1, at art. 100-01 (defining piracy as follows:

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).

175. *Id.* at art. 2-4, 55.

176. *Id.* at art. 111.

Member State reasonably believes the suspect vessel has broken the country's law; additionally, a Member State must give a discernable signal for the suspected pirate vessel to stop before engaging in hot pursuit.<sup>177</sup> This right of hot pursuit extends only to a Member State's territorial boundaries up to and including the furthest point in that nation's exclusive economic zone.<sup>178</sup> UNCLOS allows for Member States to continue their pursuit outside of their own territorial waters so long as the pursuit remains uninterrupted and there is no passage into the sovereign territorial waters of the suspect ship's flag state or a third party state.<sup>179</sup> This limitation on pursuit demonstrates the Achilles' heel of the relevant anti-piracy sections of UNCLOS in that they do not permit incursion or pursuit of pirates into another nation's territorial waters.<sup>180</sup> Somali pirates have, until recently, capitalized on this jurisdictional handicap.<sup>181</sup> Unfortunately, the provisions of UNCLOS that are pertinent to piracy limit their scope to the high seas.

#### B. Rome Convention

The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, or more commonly the Rome Convention, was adopted midway through the ratification process of UNCLOS.<sup>182</sup> This groundbreaking conference was again the product of the United Nations, although this time it acted through the International Maritime Organization.<sup>183</sup> The Rome Convention was adopted in 1988 and entered into force during March of 1992.<sup>184</sup> This convention was wholly targeted at increasing maritime safety and reducing violence on the high seas.<sup>185</sup>

The catalyst which brought about the demand for the Rome Convention was the then isolated incident of terrorism, and arguably piracy, involving the *Achille Lauro*.<sup>186</sup> This incident opened the eyes of the international community because it was "one of the first genuine acts of maritime terrorism recorded in

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177. *Id.*

178. *Id.*

179. *Id.*

180. See UNCLOS, *supra* note 1, at art. 111.

181. See Xan Rice, *How savage pirates reign on the world's high seas*, GUARDIAN NEWS, Apr. 27, 2008, <http://www.guardian.co.uk/world/2008/apr/27/somalia1>.

182. Becker, *supra* note 22, at 808.

183. Tuerk, *supra* note 19, at 339; Stanley B. Weeks, *Maritime Cooperation in Asia Pacific Region*, BNET BUS. NETWORK, March 2000, [http://findarticles.com/p/articles/mi\\_qa5367/is\\_200003/ai\\_n21453717/pg\\_2](http://findarticles.com/p/articles/mi_qa5367/is_200003/ai_n21453717/pg_2) (noting that both articles identify the International Maritime Bureau as the authoring body of the Rome Convention).

184. Rome Convention, *supra* note 18.

185. Stiles, *supra* note 24, at 310.

186. Tuerk, *supra* note 19, at 338-39.

modern history.”<sup>187</sup> The hijacking of the *Achille Lauro* highlighted flaws in the existing UNCLOS regulations regarding piracy, which in turn prompted the occurrence of the Rome Convention.<sup>188</sup> The pertinent articles within UNCLOS failed to address single ship incidents such as the *Achille Lauro*, in which the violent act perpetrated did not involve another vessel.<sup>189</sup> In other words, the UNCLOS definition of piracy only encompassed acts committed “by the crew or the passengers of a private ship or a private aircraft.” This language essentially requires the use of a private vessel to commit a covered act.<sup>190</sup> The UNCLOS provisions also required the covered act of piracy be for “private ends.”<sup>191</sup> The ambiguity of this language surfaced after the *Achille Lauro* incident because the PLO terrorists arguably were not acting for private ends, but rather public or political goals.<sup>192</sup> In order to address these concerns, the 1988 Rome Convention expanded the definition of piracy to encompass hijackings irrespective of the number of vessels involved and removed mention of a requirement that the covered acts be for private ends.<sup>193</sup>

Many critics claim that the Rome Convention deals solely with terrorism; this is a flawed argument and, in fact, the term “terrorism” does not appear in the document.<sup>194</sup> The main motivation behind the document was definitely the prevention of maritime terrorism, but its provisions are directly applicable to most violent acts of piracy which occur today.<sup>195</sup> The Rome Convention defines piracy to include any acts or attempted acts of violence committed against a person or ship, seizing control, damaging, or destroying a ship.<sup>196</sup> The relevant sections of the Rome Convention also attach criminal liability for aiding and abetting the aforementioned actions.<sup>197</sup> The jurisdictional boundaries included in the Rome Convention are similar, but distinct from their respective counterparts in the UNCLOS.<sup>198</sup> Pursuant to the boundaries, signatory states to the Rome Convention are not allowed to seize a pirate’s ship unless they first have a specific connection with the vessel.<sup>199</sup> This requirement departs

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187. *Id.* at 339.

188. *Id.*

189. Dahlvang, *supra* note 148, at 27.

190. UNCLOS, *supra* note 1, at art. 101(a).

191. *Id.* at art. 101.

192. Dahlvang, *supra* note 148, at 27.

193. Rome Convention, *supra* note 18, at art. 3 (noting the lack of language requiring that the criminal act be perpetrated to further “private ends.”)

194. Murphy, *supra* note 169, at 164.

195. *See generally* Murphy, *supra* note 169.

196. Rome Convention, *supra* note 18, at art. 3.

197. *Id.*

198. *Id.*

199. *Id.*; Stiles, *supra* note 24, at 312.

significantly from similar operative language in UNCLOS, which allows any Member State to board a vessel suspected of piracy, so long as that vessel is in either international waters or the territorial waters of the Member State.<sup>200</sup>

Another difference between the Rome Convention and UNCLOS is that the latter restricted its discussion of piracy to the high seas, whereas the former increases the depth of its discussion of piracy to include the territorial waters of Member States.<sup>201</sup> The high seas are not explicitly defined by UNCLOS, but are implicitly recognized as being “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State . . . .”<sup>202</sup> The Rome Convention applies to all ships which travel outside of their nation’s territorial waters and more importantly to acts which occur within their nation’s territorial waters.<sup>203</sup> Notwithstanding this difference, in both documents the United Nations limited its member nations’ ability to respond to pirate attacks by preventing foreign incursions into the sovereign waters of another nation and thereby effectively crippling any opportunity to wage a fight against piracy.<sup>204</sup>

#### VI. RESOLUTION 1816: PROGRESS AS PROMISED

The United Nations’ anti-piracy regulation’s frustratingly slow pace of advancement has made a large leap forward with Resolution 1816.<sup>205</sup> This action by the United Nations Security Council was drafted and initiated by a concert of nations including the United States, France and Panama.<sup>206</sup> This progressive document is the first to afford law enforcement and military units the

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200. UNCLOS, *supra* note 1, at art. 111; *see* Stiles, *supra* note 24, at 311.

201. *See* Stiles, *supra* note 24, at 309-12.

202. UNCLOS, *supra* note 1, at art. 86.

203. Rome Convention, *supra* note 18, at art. 4.

204. *See* Stiles, *supra* note 24, at 312 (noting the following description of the limiting factors involved in the Rome Convention:

The Rome Convention, however, limits the power to deal with its enumerated offenses in two substantial respects. First, Rome Convention states have no right to stop and inspect ships if they suspect a ship of engaging in pirate activities in territorial waters or terrorist activities. Second, unlike the traditional right of any state to seize a pirate ship on the high seas, a Rome Convention state must have some direct connection to the offense to seize a ship in territorial waters.

205. Compare UNCLOS, *supra* note 1, and Rome Convention, *supra* note 18, with Resolution 1816, *supra* note 14 (noting the long time frame between submission and adoption of documents, and the deficiencies previously discussed in this comment regarding UNCLOS and the Rome Convention).

206. *Navies to tackle Somali Pirates*, BRIT. BROAD. CORP., Jun. 2, 2008, <http://news.bbc.co.uk/2/hi/africa/7432612.stm>.



ability to enter into Somalia's territorial seas to interdict the pirates in what was previously their safe haven.<sup>207</sup>

The events which led to the adoption of this document can be definitively traced to a 2005 adoption by the International Maritime Organization Resolution A.979(24).<sup>208</sup> After the International Maritime Organization (IMO) adopted this earlier resolution, it was submitted to the United Nations Secretary General "for consideration and any further action he may deem appropriate."<sup>209</sup> The United Nations responded in a positive manner by encouraging Member States to take a more vigilant and proactive approach to piracy near Somalia.<sup>210</sup> In 2007, the IMO made a statement which communicated that deliveries of aid and relief supplies were being prevented by piracy along Somalia's coast.<sup>211</sup> Later that year the United Nations Security Council adopted Resolution 1772, which took notice of IMO's statements regarding relief supplies.<sup>212</sup> The final predicate action, which spurred the creation and eventual adoption of Resolution 1816, was the passage of IMO Resolution A.1002(25).<sup>213</sup> Among other things, this resolution called for Somalia's Transitional Federal Government to consent to foreign military actions within its territorial waters.<sup>214</sup>

Resolution 1816 provides that any state cooperating with the interim Somali government, "may . . . [e]nter the territorial waters of Somalia for the purpose of repressing acts of piracy . . . at sea."<sup>215</sup> A director of the International Chamber of Shipping recently commented that, "[t]he text [of Resolution 1816] needs to

207. *See id.*

208. *IMO welcomes Security Council moves on Somali piracy*, Briefing 24, Int'l Mar. Org., June 3, 2008, [http://www.imo.org/About/mainframe.asp?topic\\_id=1709&doc\\_id=9212](http://www.imo.org/About/mainframe.asp?topic_id=1709&doc_id=9212) [hereinafter *IMO Briefing 24*].

209. *IMO Briefing 48*, *supra* note 19.

210. *Id.* (noting the exact language of the United Nations response is as follows:

The Security Council takes note of Resolution A.979(24) adopted on 23 November 2005 at the twenty-fourth session of the International Maritime Organization biennial Assembly, concerning the increasing incidents of piracy and armed robbery against ships in waters off the coast of Somalia. The Council encourages Member States whose naval vessels and military aircraft operate in international waters and airspace adjacent to the coast of Somalia to be vigilant to any incident of piracy therein and to take appropriate action to protect merchant shipping, in particular the transportation of humanitarian aid, against any such act., in line with relevant international law. . . . The Council further urges cooperation among all States, particularly regional states, and active prosecution of piracy offenses.)

211. *Id.*

212. *Id.*

213. *IMO Briefing 24*, *supra* note 208.

214. *Id.*

215. Resolution 1816, *supra* note 14, at art 7.

be more certain about what is and is not appropriate activity to suppress piracy.<sup>216</sup> Certain perceived deficiencies lend support to the conclusion that modifications of the resolution are necessary: a lack of any United Nations naval assets committed to the problem, Resolution 1816's lack of mandatory duty to take action (as opposed to discretionary authority), no initiative to protect humanitarian aid bound for Somalia, no grant of authority by which mariners could arm themselves for self defense purposes, and a requirement that nations acting against piracy pursuant to Resolution 1816 must satisfy mandatory communication requirements with a nearly non-existent government.<sup>217</sup>

Through Resolution 1816, the United Nations has urged its Member States to fix Somalia's piracy problem but deployed no naval peacekeeping assets to support the cause.<sup>218</sup> An application of force by a multilateral organization such as the United Nations would serve to deter acts of piracy and prevent possible unintended consequences of individual naval powers, such as the United States, acting unilaterally.<sup>219</sup> Western nations must be cautious in the level of unilateral military force they apply to the Somali piracy problem.<sup>220</sup> For example, a misapplication of force by the United States in a predominantly Muslim region will again paint America as an aggressor and serve only to further stress international relations, thereby preventing a multinational naval force from taking shape.<sup>221</sup> This same line of reasoning serves to support the hypothesis that increased anti-American sentiment, caused by an increased United States' naval presence, will stoke the fires of terrorism and thereby increase acts of piracy.<sup>222</sup>

Another potential problem with Resolution 1816 is that its operative language plainly grants discretionary authority through its usage of the word "may."<sup>223</sup> Nations "may" act in response to piracy, but nations have no duty or

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216. Neville Smith, *Calls to beef up UN resolution on anti-piracy*, LLOYD'S LIST, Oct. 1, 2008, <http://www.lloydslist.com/ll/news/calls-to-beef-up-un-resolution-on-anti-piracy/20017576516.htm?jsessionid=925CB4826C7E32E1EA87E46CF8E00829?src=ticker>.

217. Resolution 1816, *supra* note 14 (noting that no naval assets were pledged to fight piracy in Somalia).

218. *Id.*

219. Crilly, *supra* note 66 (noting that armed escorts have in fact deterred acts of piracy and allowed the delivery of much needed aid and supplies to the impoverished and starving people of Somalia); Bahar, *supra* note 34, at 6.

220. Bahar, *supra* note 34, at 6-7.

221. *Id.* at 7.

222. *Id.*

223. *Id.* (noting that Member States may enter, or conversely, may not. This discretionary action clause is self defeating in the sense that most nations that have the assets to fight piracy are actively engaged in conflicts around the world and probably won't elect to engage in a naval battle with Somali pirates).

obligation to act in response to piracy under this resolution.<sup>224</sup> A more aggressive approach to piracy near Somalia's coast would be to require the pursuit and interdiction of any suspected or confirmed pirates.<sup>225</sup> Resolution 1816 comes heralded by the media as a panacea to the plague of piracy, but it is fundamentally only removing the trivial punishment that a Member State might have received if it had entered Somalia's sovereign waters to rescue innocent lives and recover stolen property.<sup>226</sup> Both the United States and France have taken action against Somali pirates prior to the passage of Resolution 1816 and neither received any reprimand from the United Nations.<sup>227</sup>

Resolution 1816 requires that any Member State acting pursuant to the resolution must be cooperating with the Transitional Federal Government (TFG) of Somalia.<sup>228</sup> Furthermore, the TFG must provide the United Nations' Secretary-General with advance notification of its grant of permission to any Member State attempting to act under Resolution 1816.<sup>229</sup> Facially, this presents no obstacle to tactical response under the resolution, but when analyzing the actual power and current governmental capabilities of Somalia's TFG, it becomes readily apparent that meeting these two requirements might be more challenging than first expected.<sup>230</sup> The United States has an interest in promoting peace and stability in the region, yet because Somalia lacks a government with which to engage and interact with, no diplomatic relationship exists between the TFG and the United States.<sup>231</sup> The TFG has failed to establish and provide for its citizens' most basic needs.<sup>232</sup> Additionally, the International Maritime Organization recently supported a precursor to Resolution 1816, IMO Resolution A.1002(25), by citing a report by a United Nations' monitoring group confirming that the root cause of piracy in Somalia was the "lack of lawful administration and the inability of the authorities to take

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224. *Id.*

225. Ann Scott Tyson, *U.S. Steps Up Anti-Piracy Actions*, THE WASH. POST, Dec. 16, 2007, at A33 (noting the efficacy of such measures and therefore concluding that if they were required the frequency of their implementation would increase, thereby resulting in decreased instances of piracy and increased confidence in the perpetuity of international trade).

226. See Roger, *supra* note 137 (noting the French rescue mission occurred prior to the adoption of Resolution); Tyson, *supra* note 225 (noting the US entry into Somalia's waters occurred prior to the passage of Resolution 1816); *Foreign Aid*, *supra* note 26.

227. Doland, *supra* note 9; Resolution 1816, *supra* note 14.

228. Resolution 1816, *supra* note 14.

229. *Id.*

230. Compare Resolution 1816, *supra* note 14, with Brief Amici Curiae *supra* note 40, at 12-13 (noting the lack of cognizable traditional governmental function assumed by Somalia's Transitional Federal Government).

231. See Brief Amici Curiae *supra* note 40, at 12-13; Swan, *supra* note 43.

232. Swan, *supra* note 43.

affirmative action against the perpetrators . . . .”<sup>233</sup> Thus far, the United Nations has been unable to successfully implement its arms embargo or even admonish the current Somali government because it lacks any viable government authority with which to address its concerns.<sup>234</sup> If the United Nations has difficulty communicating with the Somali government, it intuitively follows that those same communicative barriers will prohibit Member States who do voluntarily desire to take the fight against Somali pirates into their territorial waters to meet the requirements of Resolution 1816.<sup>235</sup>

In addition to Resolution 1816’s communicative requirements, it sacrifices the sovereignty of Somalia’s territorial waters in an effort to suppress piracy.<sup>236</sup> The current Somali leadership gladly made this concession and appealed for yet more help in eradicating piracy along its coast.<sup>237</sup> Task Force 150 (“CTF-150”) is a multinational naval force committed to the suppression of both piracy on the high seas and acts of terror.<sup>238</sup> This military unit has been in place for several years, but it has been largely unable to make a permanent impact on piracy levels off of Somalia’s coast.<sup>239</sup> This is due in part to the task force’s other anti-terror obligations in the Middle East, but its greatest obstacle has been the inability to enter the sovereign waters of another nation in pursuit of suspected pirates.<sup>240</sup> Resolution 1816 will now allow specialized naval forces such as CTF-150 to pursue and apprehend suspected pirates, as well as to aid those who have been taken hostage to fuel the lucrative Somali ransom market.<sup>241</sup>

The recent increases in piracy are attributable to many factors, but one is undoubtedly the inability of merchant vessels to adequately provide for their own defense.<sup>242</sup> It is not practical to expect merchant crewmen using only water hoses to repel upwards of thirty or more pirates armed with automatic weapons.<sup>243</sup> It is likewise unreasonable to expect the crewmen to engage pirates without the benefit of modern armament; to encourage this form of fighting

233. I.M.O. Res A.1002(25), ¶ 14, U.N. Doc. A25/RES/47/1 (Nov. 29, 2007).

234. Brief Amici Curiae, *supra* note 40, at 12-23.

235. *Id.*

236. Resolution 1816, *supra* note 14 (noting that the ability to enter the waters previously used as a safe haven will allow both pursuit and apprehension of suspected pirates).

237. *Booming Business*, *supra* note 20.

238. LEHR & LEHMANN, *supra* note 36, at 18; *UPDATE*, *supra* note 102.

239. *See* LEHR & LEHMANN, *supra* note 36, at 18-19; Bedford, *supra* note 35.

240. LEHR & LEHMANN, *supra* note 36, at 18; Bedford, *supra* note 35; Resolution 1816, *supra* note 14.

241. Resolution 1816, *supra* note 14.

242. Stiles, *supra* note 24, at 313.

243. *Id.*; *En garde à vue, les pirates du Ponant racontent leur fortune de mer*, AGENCE FRANCE-PRESSE, Apr. 17, 2008, [http://afp.google.com/article/ALeqM5g6EiZ0LfgWU4\\_g8uXIZlpG-zOs0A](http://afp.google.com/article/ALeqM5g6EiZ0LfgWU4_g8uXIZlpG-zOs0A).

would result in nothing more than their deaths.<sup>244</sup> Equally unreasonable is the proposition that those who traverse the shipping lanes off of Somalia's coast should categorically surrender their ships and cargo to attacking pirates.<sup>245</sup> A constructive addition to Resolution 1816 which addresses this issue would grant mariners on confirmed courses through the Gulf of Aden the ability to travel armed, in order to prevent or discourage being boarded by pirates.<sup>246</sup> This proposition is not without its entanglements.<sup>247</sup> The United Nations has an interest in preventing the flow of weapons into Somalia and other regions of Africa.<sup>248</sup> Granting all vessels traveling near Somalia access to its sovereign territorial waters, as well as the ability to carry sizeable arsenals, could run contrary to the United Nations' peacekeeping goals.<sup>249</sup> It may be possible to reconcile both the United Nations' previous commitment to an arms embargo on Somalia and the desire to allow shipping vessels to engage in self-defense.<sup>250</sup> The United Nations could modify Resolution 1816 to allow the use of weapons in self defense and also provide for its arms embargo by requiring vessels to carry weapon inventories.<sup>251</sup> Upon entering and leaving Somali waters, these inventories could be compared by United Nations inspectors to verify that they have remained unchanged.<sup>252</sup>

Resolution 1816 should not be viewed as a failure, but rather as a progressive step towards the solution of a problem posed to mariners, Somali citizens and the international community.<sup>253</sup> This document departed from precedent by granting permission, notwithstanding controlled circumstances, to violate that sanctity which every nation attaches to its own territory.<sup>254</sup> Such a deviation from convention came only after the fervent calls for help from Somalia itself, the IMO and the exponentially increasing population of people who have fallen victim to piracy near Somalia's coast.<sup>255</sup> The United Nations should not cite current events or a timely statistical decline in Somali piracy as a reason to stop the necessary progression of the strategy they initiated with the

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244. Stiles, *supra* note 24, at 313.

245. *Id.*

246. *Id.* at 314-16.

247. *Id.*

248. Resolution 1816, *supra* note 14.

249. *Id.*; Stiles, *supra* note 24, at 313.

250. See Stiles, *supra* note 24, at 315 (applying the proposed general courses of action to the particular situation involving Somalia).

251. *Id.*

252. *Id.* at 315-16.

253. See *Navies to tackle Somali Pirates*, *supra* note 206.

254. See Resolution 1816, *supra* note 14.

255. *Booming Business*, *supra* note 20.

passage of Resolution 1816.<sup>256</sup> Forward progress and successful eradication of Somali piracy may be assured by enacting modifications to the actual resolution as well as the implementation of a land based strategy that will maintain the advances made by the “off-shore” approach of Resolution 1816.<sup>257</sup>

## VII. CHARTING A NEW COURSE

Resolution 1816 is a strong response to the worsening problem of piracy along Somalia’s lengthy coast.<sup>258</sup> Through this resolution, the international community has embarked upon a constructive “off-shore” course of action with regard to piracy near Somalia; this strategy aims to resolve the problem by attacking it from the sea, as opposed to a land based policy to stop piracy.<sup>259</sup> In order to ensure the future efficacy of this resolution and its progeny, modifications to its language and provisions are necessary. First, changes must be made to the current resolution to allow peaceful merchants to defend themselves.<sup>260</sup> Secondly, the United Nations should require, rather than merely permit, able and available naval assets of Member States to take action to interdict observed pirate activity.<sup>261</sup> Lastly, the United Nations should accompany any subsequent resolutions with a commitment of some amount their land and naval peacekeeping forces to the region.<sup>262</sup> The current form of Resolution 1816 places a heavy burden on western nations because they are the most likely to have the naval resources to devote to Somalia in order to fight piracy.<sup>263</sup> An updated resolution deploying multilateral international peacekeeping forces would see far less political resistance and backlash than yet another anti-terror fight by the United States and its western allies against a perceptually weaker Islamic state.<sup>264</sup>

If the international community desires complete eradication of piracy rather than mere repression or partial cessation, it must first implement a revised “off-shore” approach through the aforementioned changes to Resolution 1816 and

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256. See generally Doland, *supra* note 9 (noting the success able bodied nations are able to achieve with access to Somali territorial waters. Furthermore, if interdictions such as these continue to unfold against Somali pirates, it is conceivable that the in the short term the piracy epidemic may face statistical decline).

257. Bedford, *supra* note 35.

258. *Id.*

259. *Id.*

260. See Stiles, *supra* note 24; Bahar, *supra* note 34.

261. See Stiles, *supra* note 24; Tyson, *supra* note 232; Bahar, *supra* note 34, at 11-18.

262. See generally Stiles, *supra* note 24; Tyson, *supra* note 232; Bahar, *supra* note 34.

263. See generally Bahar, *supra* note 34, at 7.

264. See Bahar, *supra* note 34, at 6-7.

then initiate a second land-based step.<sup>265</sup> This second step should consist of support by the international community for the formation of a viable governmental structure within Somalia.<sup>266</sup> There is significant evidence to support the contention that Somalia's lack of any cohesive central authority is directly related to the rise in piracy.<sup>267</sup> An eye opening admission by an anonymous Somali pirate highlights the interconnectivity of violence, piracy and a lack of government, "I am Somali; the gun is our government."<sup>268</sup> Prior to the 1991 collapse of Somalia's government there were few if any documented instances of piracy.<sup>269</sup> Since that time piracy has become more organized and the frequency of attacks has increased.<sup>270</sup> However, during the six-month rule of the Union of Islamic Courts in 2006 piracy in the area they controlled completely stopped.<sup>271</sup> After the UIC took control of Somalia they issued a statement declaring that incidents of piracy would be punished under the strict Islamic Sharia law.<sup>272</sup> The most rational conclusion supported by this evidence is that when a government is providing for the needs of its citizens and punishing criminal acts, the incentive for engaging in piracy is greatly diminished.<sup>273</sup>

Furthermore, a fully functional government would provide the necessary foundation to deal with the core problem of piracy as opposed to treating its symptoms.<sup>274</sup> This central issue of piracy would be solved in part by allowing peacekeeping naval forces to more easily meet the communication requirements of Resolution 1816.<sup>275</sup> A functional government could also provide and maintain an entity responsible for the regulation of commercial fishing in Somalia's territorial waters, thereby eliminating the local warlords' income sources and justifications for engaging in piracy.<sup>276</sup>

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265. Bedford, *supra* note 35.

266. *Id.*

267. *Id.*

268. Bahar, *supra* note 34, at 7.

269. Bedford, *supra* note 35.

270. *Id.*

271. Bedford, *supra* note 35. (noting the cessation of piracy during the UIC's rule and inferring that the harshness of Islamic Sharia law greatly reduced the incentive to engage in violent acts of piracy).

272. Audrey Gillan, *Guns, grenades and GPS: the brutal reality of Somalia's hi-tech pirates*, THE GUARDIAN, June 12, 2007 <http://www.guardian.co.uk/world/2007/jun/12/audreygillan.international>.

273. *See generally* Bedford, *supra* note 35.

274. *See generally* Brief Amici Curiae, *supra* note 40.

275. *See id.*

276. LEHR & LEHMANN, *supra* note 36, at 13.

The practical implementation of the second prong of this strategy is complicated by Somalia's fractured political state.<sup>277</sup> Several major regions within the country, including Puntland, which is a hotbed of piracy, have operated independent from the capital city of Mogadishu since the 1991 fall of Barre's regime.<sup>278</sup> A course of diplomacy recognizing and supporting multiple governmental structures within the current borders of Somalia, each having authority over these disparate regions, would be more effective than the international community's past attempts to foster a nationwide democratic state.<sup>279</sup> This land-based strategy also requires the continued attention of an international community distracted by conflicts throughout Africa and the Middle East.<sup>280</sup> Somali pirates inadvertently advanced their notoriety by hijacking a cargo of anti-aircraft weapons and Russian made tanks allegedly destined for war ravaged Sudan.<sup>281</sup> In doing so, they also demonstrated that piracy has become inextricably bound with other ongoing conflicts in Africa.<sup>282</sup> If the hijacked weapons were being transferred to southern Sudan, this would constitute a breach of an internationally negotiated peace agreement which ended the brutal twenty-one year civil war in Sudan.<sup>283</sup> This staggering recent development in the Somali piracy problem will unquestionably support the focused determination necessary to implement this strategy.<sup>284</sup>

This two-fold strategy of modifying Resolution 1816 and fostering some form of a capable Somali government will play an important role in the continued eradication of terrorism throughout the world.<sup>285</sup> This assertion is best demonstrated in the form of a syllogism: if the international community ensures

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277. See LEHR & LEHMANN, *supra* note 36, at 11 (noting that attempting to form a cohesive government would be problematic in and of itself, but this is exacerbated by the fact that many of the autonomous regions within Somalia each consider themselves independent sovereigns, and would much prefer to be recognized as such than to be grouped again in the entire unit that is Somalia).

278. Bedford, *supra* note 35.

279. *Id.*

280. *Id.* (observing that conflicts range from genocide in Rwanda to outright civil war in The Democratic Republic of the Congo).

281. Wadhams, *supra* note 99.

282. *See id.*

283. *Id.*

284. Jeffery Gentleman, *Somali Pirates Capture Tanks and Global Notice*, THE N.Y. TIMES, Sep. 26, 2008, available at <http://www.nytimes.com/2008/09/27/world/africa/27pirates.html> (noting that Somali pirates inadvertently hijacked a cargo of 33 Russian made T-72 tanks and ammunition bound for the brutal warzone of Sudan. Although the international community responded and prevented any off-loading of the dangerous cargo, this incident highlights the very real threat piracy poses).

285. See generally Masciarelli, *supra* note 101; Wadhams, *supra* note 99; BANLAOI, *supra* note 100 at 121-22.



the safety of Somalia's seas, those same seas will be unavailable for acts of terror designed to restrict the flow of oil and trade through the Suez Canal.<sup>286</sup> At which point, those seas will also be unavailable for acts of piracy which result in the redirection of weapons to the hands of terrorists.<sup>287</sup> If these options are removed from the battery of strategies employed by terrorists, then the two part plan executed in an effort to combat Somalia's pirates has effectively reduced the threat of terror to the international community in general.<sup>288</sup>

A reduced threat of terrorist attacks is an important but tertiary goal to the approach described above.<sup>289</sup> A comprehensive land based political, and sea based tactical strategy would effectively remove the threat of piracy from this region of the world.<sup>290</sup> At that point the Somali people would have their needs provided for by a government of the people and the vital trade routes into the Gulf of Aden would be secure from pirate attacks born of organized crime and desperation.<sup>291</sup>

### VIII. CONCLUSION

The drastic rise in piracy within the last two decades has provoked escalating responses from the United Nations.<sup>292</sup> Until Resolution 1816, progress was slow to be realized and made little overall difference in reducing piracy worldwide.<sup>293</sup> The Somali pirates, while sometimes motivated by hunger,

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286. LEHR & LEHMANN, *supra* note 36 at 11, 16 (noting Somalia's lack of naval or police forces and proximity to the trade lanes off of the Horn of Africa and making the inference that additional forces will thereby secure those vital trade lanes).

287. *See generally* Masciarelli, *supra* note 99; Wadhams, *supra* note 99; BANLAOI, *supra* note 100 at 121-22.

288. *See generally* Masciarelli, *supra* note 99; Wadhams, *supra* note 99; BANLAOI, *supra* note 100 at 121-22 (drawing the conclusion that if the international community stifles the funding and supply of terrorist within Somalia, they have effectively reduced the probability of a terrorist attack being generated from individuals within that nation).

289. *See generally* Bedford, *supra* note 35 (noting that a reduction in threats of terrorism is not included as a potential benefit of the two pronged plan).

290. *Id.*

291. *Id.*

292. *See generally* UNCLOS, *supra* note 1; Rome Convention, *supra* note 18; Resolution 1816, *supra* note 14 (noting that the escalation may be seen from the all encompassing document that is UNCLOS, to the more pointed and specific attempt to deal with violence on the high seas that is the Rome Convention and ending with the specific thrust to remove the threat of piracy from one of the world's most utilized trade lanes in the form of Resolution 1816).

293. *See generally* UNCLOS, *supra* note 1; Rome Convention, *supra* note 18; Resolution 1816, *supra* note 14 (noting the long time frame between submission and adoption of documents, and the deficiencies previously discussed in this comment regarding UNCLOS and the Rome Convention); *See* IMO Briefing 48, *supra* note 19.

should not be romanticized.<sup>294</sup> They have stolen, murdered, destroyed, plundered and escaped silently into the night hundreds of times in recent history.<sup>295</sup> The aggregate affect of those actions will never be known, as many go unreported.<sup>296</sup> It is imperative to realize that because of piracy's effect on individual human lives, trade, and transport, it is not only Somalia that has a piracy problem, but many nations of the world as well.<sup>297</sup> The repression of international trade has been one unintended consequence of the Somali pirates' actions.<sup>298</sup> International trade, transport and commerce are essential to the survival of the world's nations.<sup>299</sup> Any actions taken to endanger, hold back or repress international trade should be dealt with swiftly and thoroughly by the international community.<sup>300</sup> The United Nations embodies proactive cooperation among its Member States and can therefore be held to represent the very spirit of international collective action.<sup>301</sup> Therefore, it falls squarely upon the shoulders of the United Nations to respond with extreme prejudice against those that would harm international trade or the safety of those who facilitate its logistics.<sup>302</sup>

Resolution 1816 opens the door far wider than ever before to allow those nations with the requisite naval resources to protect and vindicate the rights of their merchants.<sup>303</sup> This resolution has allowed those nations with assets pledged to the purpose of fighting piracy to more effectively accomplish their mission.<sup>304</sup> Yet pundits and experts state that those countries with the ability to

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294. See Bahar, *supra* note 34, at 41.

295. See *Somali pirates kill ship crew member: maritime source*, REUTERS, June 4, 2007, <http://www.reuters.com/article/newsOne/idUSL0413318520070604> (noting that loss of life has occurred in similar situations in the past).

296. BURNETT, *supra* note 20, at 10-11.

297. See generally Roger, *supra* note 8; Costello, *supra* note 30.

298. Costello, *supra* note 30; Khan, *supra* note 116.

299. Michael J. Chrusch, *The 299. Michael J. Chrusch, The North American Free Trade Agreement: Reasons For Passage And Requirements To Be A Foreign Legal Consultant In A NAFTA Country*, 3 ILSA J. INT'L & COMP. L. 177, 177 (1996)

300. U.N. Charter Preamble (noting that the U.N. was formed, in part, to preserve and "promote social progress and better standards of life." These goals can arguably be accomplished by allowing all nations to prosper, which is only possible through continued and sustained international trade).

301. *Id.*

302. See *id.*

303. Resolution 1816, *supra* note 14 at ¶ 7 (noting that those with naval resources may now enter Somalia's sovereign territorial waters to protect their nation's commerce and citizens who have or might fall victim to piracy).

304. See generally Resolution 1816, *supra* note 14 (noting the latitude afforded Member States to enter Somali waters to pursue suspected pirates).

engage the pirates have largely failed to do so.<sup>305</sup> Resolution 1816 does not respond with the necessary strength as it fails to match the daunting task of eradicating piracy with a directly proportional application of both force and law.<sup>306</sup> If the United Nations wanted to go beyond a mere reduction in piracy and unequivocally eliminate it, the international body politic should have appropriated far more than a request for others to act.<sup>307</sup> Changes to the substance and form of the resolution should be made and an aggressive application of political pressure to form a stable governmental authority needs to be applied by the international community in order to completely stem the tide of Somalia's piracy.

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305. Corey Flintoff, *Piracy Flourishes Along Crucial Shipping Lane*, NAT'L PUB. RADIO, Oct. 3, 2008, <http://www.npr.org/templates/story/story.php?storyId=93893918>.

306. *See generally* ICC Commercial Crime Services, *supra* note 19; *See also* IMO Briefing 48, *supra* note 19 (noting the description of drastic recent increases in Somalia's piracy problem, and the persistent pleas for help from the IMO that, until Resolution 1816, went largely unanswered); Tuerk, *supra* note 19 (noting that since 2001, increasing numbers of nations have ratified the Rome Convention which arguably demonstrates an increase in international desire to eradicate threats to trade and stability in the forms piracy and terrorism.); Resolution 1816, *supra* note 14 at ¶ 7 (noting that Resolution 1816 allows countries to commit their own forces to combat an international problem, but fails to allocate any United Nations peacekeeping forces in either a naval, or a land based capacity to prevent piracy off of Somalia's coast).

307. *See generally* Resolution 1816, *supra* note 14 at ¶ 7 (noting that Resolution 1816 allows countries to commit their own forces to combat an international problem, but fails to allocate any United Nations peacekeeping forces in either a naval, or a land based capacity to prevent piracy off of Somalia's coast.).