

# Denver Journal of International Law & Policy

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Volume 39  
Number 2 *Spring*

Article 1

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April 2020

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### Recommended Citation

Ved P. Nanda, Maritime Piracy: How Can International Law and Policy Address This Growing Global Menace, 39 Denv. J. Int'l L. & Pol'y 177 (2011).

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# **MARITIME PIRACY: HOW CAN INTERNATIONAL LAW AND POLICY ADDRESS THIS GROWING GLOBAL MENACE?**

VED P. NANDA \*

## I. INTRODUCTION

Maritime piracy disrupts international navigation and trade and threatens the lives and property of people of many nations. Thus, because of both the human and commercial cost and the threat to regional security at sea, piracy has become a matter of grave concern for the international community and has consequently attracted global attention. Several international organizations including the United Nations Security Council and General Assembly, the North Atlantic Treaty Organization (NATO), the International Maritime Organization (IMO), and regional organizations such as the European Union (EU) and African Union (AU) have been actively engaged in addressing this grave problem.

Navies from the EU and NATO and from several countries, including the United States, Russia, China, India, and Japan, have deployed their warships off the coast of Somalia and in the Gulf of Aden to protect trade routes and the global supply chain because of the recent upsurge of attacks on ships by Somali pirates. However, notwithstanding these deployments, the attacks on and hijacking of ships transiting the area continue, and as the problem is not confined just to that geographical area, pirate attacks have intensified in other areas where there is not such deployment, including West Africa, Southeast Asia, and the Caribbean. Thus, it would be a fair appraisal that these efforts have met with only limited success in combating the menace of piracy and armed robbery.

To address the challenge posed by pirates, the United Nations Security Council has adopted several resolutions authorizing states to take the necessary action to combat piracy, including in the territorial waters of Somalia. Norms prescribed under several conventions including the U.N. Law of the Sea Convention (UNCLOS), maritime law, and domestic laws of various states provide for jurisdiction by states to prosecute and punish pirates. The UN Secretary General has offered several options on “prosecuting and imprisoning persons

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responsible for acts of piracy and armed robbery at sea off the coast of Somalia,” including the creation of a regional or international tribunal.<sup>1</sup> Although piracy must indeed be seen as a global challenge that requires a global response,<sup>2</sup> and while this paper addresses the challenges of piracy to the entire international community and explores actions that could effectively meet them, its focus will primarily be on the Somali pirates.

The next section assesses the nature and scope of the challenge. This is followed by a discussion of the legal framework applicable to piracy and a review of the wide range of international, regional, and national responses to prevent and deter acts of piracy and punish the perpetrators. The concluding sections contain an appraisal and recommendations.

## II. NATURE AND SCOPE OF THE CHALLENGE

Acts of piracy have been on the rise for several years, presenting a serious threat to commercial maritime shipping, especially in the Gulf of Aden and off the Horn of Africa. For international shipping and trade both east and west of the Suez Canal, the strategic importance of the Gulf of Aden lies in the number of vessels and the volume of the international trade passing through it—22,000 vessels annually, carrying around eight percent of the world's trade, including twelve percent of the total volume of oil transported by sea, raw materials and finished goods, as well.<sup>3</sup>

Somalia has suffered from the tragedy of an ongoing civil strife since 1991, and this surge of piracy off its coast is primarily related to its being a failed state<sup>4</sup>

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1. U.N. Security Council [SCOR], *Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results*, ¶¶ 80-104, U.N. Doc. S/2010/394 (July 26, 2010) [hereinafter *SG's Report*].

2. See, e.g., ELIZABETH ANDERSEN, BENJAMIN BROCKMAN-HAWE & PATRICIA GOFF., AM. SOC'Y OF INT'L LAW ET AL., *SUPPRESSING MARITIME PIRACY: EXPLORING THE OPTIONS IN INTERNATIONAL LAW*, at i (2009) (“Maritime piracy is a persistent global criminal activity, and solving the Somali problem does not solve piracy in the rest of the world.”).

3. *Piracy in Waters Off the Coast of Somalia*, INT'L MAR. ORG. [IMO] (Nov. 13, 2009), [http://www5.imo.org/SharePoint/mainframe.asp?topic\\_id=1178](http://www5.imo.org/SharePoint/mainframe.asp?topic_id=1178).

4. In November 2008 the U.N. commissioned a workshop on “*Piracy Off the Somali Coast*,” which brought together experts from various fields – diplomacy, the military, peacekeeping, and humanitarian aid, among others. Workshop Commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah, Nairobi, Kenya, Nov. 10-21, 2008, *Piracy Off the Somali Coast*, 2 (Nov. 21, 2008), available at [http://www.imcsnet.org/imcs/docs/somalia\\_piracy\\_intl\\_experts\\_report\\_consolidated.pdf](http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf) [hereinafter *U.N. Experts Report on Somali Piracy*]. The experts produced a comprehensive study of the political and legal issues involved. *Id.* The report proved influential with the United Nations Security Council, as several of its recommendations paralleled those made in Security Council Resolution 1851 of December 16, 2008. See *id.* at 41-44. The report states that Somalia has been a failed state for about 20 years “divorced from the world economy, regional and global institutions, and the rule of law.” *Id.* at 33.

with endemic poverty and lawlessness. Acts of piracy have also disrupted the delivery of humanitarian aid to Somalia.<sup>5</sup> Off Somalia's long coast line—almost 2000 miles—foreign vessels have engaged in unauthorized fishing and the dumping of toxic material and waste ever since the early 1990s.<sup>6</sup> The names of pirate fleets such as “National Volunteer Coast Guard of Somalia” and “Somali Marines” can be aptly described as a “testament to pirates’ initial motivation.”<sup>7</sup> However, their current motivation lies in the huge ransom payments, in the range of millions of dollars, pirates receive from the companies involved, including vessel owners and insurers.<sup>8</sup> Pirates use hijacked fishing vessels as mother ships as they prey on their victims off Somalia's coastline, and have now extended their reach to more than 700 miles offshore.<sup>9</sup> They wage attacks with sophisticated weapons such as M-16 and AK-47 assault rifles and rocket-propelled grenades instead of machetes, knives, and guns, which were their weapons just a few years ago; they are also equipped with speedboats, global positioning systems, and satellite phones.<sup>10</sup>

The Piracy Reporting Center of the International Maritime Bureau (IMB), a division of the International Chamber of Commerce, issues periodic piracy reports. It reports that incidents of piracy and armed robbery in 2009 exceeded 400,<sup>11</sup> Africa accounting for 270 of these, and the Somalia coast and the Gulf of Aden accounting for 196.<sup>12</sup> Compare these more than 400 attacks with 239, 263, and 293 attacks that were reported in 2006, 2007, and 2008, respectively.<sup>13</sup>

According to the annual report of the Piracy Reporting Center for 2009, there were 84 attempted attacks, 153 vessels boarded, 120 vessels fired upon and 49 hijacked, compared to 46 ships fired upon in 2008.<sup>14</sup> The report states that in 2009 a total of 1052 crew were taken hostage, while 68 were injured and eight were

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5. *Id.* at 29.

6. Ishaan Tharoor, *How Somalia's Fishermen Became Pirates*, TIME, Apr. 18, 2009, available at <http://www.time.com/time/world/article/0,8599,1892376,00.html>.

7. *Id.*

8. Pirates extorted \$60 million in ransom in 2009 alone. See President Ali Treki, Address at the Informal Meeting of the General Assembly on International Maritime Piracy (May 14, 2010), <http://www.un.org/ga/president/64/statements/piracy140510.shtml>.

9. See INT'L MAR. BUREAU, INT'L CHAMBER OF COMMERCE, PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT: JANUARY 1 - DECEMBER 31, 2009 39 (2010).

10. William Pentland, *Sea Piracy's Bloody Growth*, FORBES.COM (June 10, 2008, 6:00 AM), [www.forbes.com/2008/06/09/piracy-logistics-shipping-biz-logistics-cx\\_wp\\_0610piracy.html](http://www.forbes.com/2008/06/09/piracy-logistics-shipping-biz-logistics-cx_wp_0610piracy.html).

11. INT'L MAR. BUREAU, *supra* note 9, at 5-6. Although the 1982 Law of the Sea Convention defines piracy in limiting terms, the IMB has adopted a broader approach for statistical purposes as it combines the terms “piracy” and “armed robbery at sea.” *Id.* at 3. The International Maritime Organization also issues periodic reports on acts of piracy and armed robbery against ships. For the 2009 report, see Int'l Mar. Org. [IMO], *Reports on Acts of Piracy and Armed Robbery Against Ships: Annual Report 2009*, IMO Doc. MSC.4/Circ.152 (Mar. 29, 2010), available at <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Monthly%20and%20annual%20piracy%20and%20armed%20robbery%20report/152-Annual2009.pdf>.

12. INT'L MAR. BUREAU, *supra* note 9, at 5-6.

13. *Id.*

14. *Id.* at 12.

killed in various incidents.<sup>15</sup> However, increased naval patrols (NATO's *Operation Open Shield* and *Allied Protector*; the EU-NAVFOR Mission; the International Combined Task Force-151; and several nations' forces) conducting anti-piracy operations have reduced the success rate of these attacks since pirates find it increasingly difficult to board and hijack vessels.<sup>16</sup> However, the first eight months of 2010 witnessed 286 attacks,<sup>17</sup> demonstrating that, despite the naval presence off the Horn of Africa and the Gulf of Aden,<sup>18</sup> pirates remain active.

In his report of July 26, 2010, to the UN Security Council, the Secretary-General noted that as of May 15, 2010, 450 mariners were being held hostage on vessels captured by pirates off the coast of Somalia.<sup>19</sup> More than 45 states participate in naval operations to combat piracy, conducted unilaterally or coordinated by the European Union Naval Operation "Atalanta," the North Atlantic Treaty Organization, and the US-led Combined Taskforce 151.<sup>20</sup>

### III. LEGAL FRAMEWORK APPLICABLE TO PIRACY

#### A. Introduction

The legal framework applicable to piracy consists of the customary international law norm, under which piracy is a *jus gentium* crime and therefore subject to universal jurisdiction,<sup>21</sup> meaning that no nexus is required and thus jurisdiction is available regardless of the nationality of the pirates or the victims, the ship or aircraft, or the location of the act. However, it has been suggested that "the nominal availability of universal jurisdiction for piracy does not translate in practice into ending impunity for the crime," as states have not implemented the jurisdictional grant through legislation.<sup>22</sup>

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15. *Id.* at 12-13.

16. *Id.* at 38.

17. See IMO, *Reports on Acts of Piracy and Armed Robbery Against Ships: Acts Reported During August 2010*, Annex 1-2, IMO Doc. MSC.4/Circ. 159 (Sept. 1, 2010); IMO, *Reports on Acts of Piracy and Armed Robbery Against Ships: Acts Reported During July 2010*, Annex 1-2, IMO Doc. MSC.4/Circ. 157 (Aug. 1, 2010); IMO, *Reports on Acts of Piracy and Armed Robbery Against Ships: Acts Reported During June 2010*, Annex 1-2, IMO Doc. MSC.4/Circ. 156 (July 7, 2010); IMO, *Reports on Acts of Piracy and Armed Robbery Against Ships: First Quarterly Report*, Annex 1-2, IMO Doc. MSC.4/Circ. 153 (June 9, 2010); IMO, *Reports on Acts of Piracy and Armed Robbery Against Ships: Acts Reported During May 2010*, Annex 1-2, IMO Doc. MSC.4/Circ. 155 (June 3, 2010); IMO, *Reports on Acts of Piracy and Armed Robbery Against Ships: Acts Reported During April 2010*, Annex 1-2, IMO Doc. MSC.4/Circ. 154 (May 5, 2010).

18. See *infra* Section III.D.

19. *SG's Report*, *supra* note 1, pt. II(B), ¶ 8.

20. See INT'L MAR. BUREAU, *supra* note 9, at 38.

21. Piracy was the first international crime subject to universal jurisdiction. As early as 1820, the United States Supreme Court stated that common law "recognises and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations . . . as an offence against the universal law of society, a pirate being deemed an enemy of the human race." *United States v. Smith*, 18 U.S. 153, 161 (1820). See also M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 136-51 (2001) (stating that under international law universal jurisdiction over piracy is well established); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 34 cmt. b (1965).

22. Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for*

Currently, the legal framework is comprised of the 1982 United Nations Convention on the Law of the Sea (UNCLOS),<sup>23</sup> which retained the provisions relating to piracy of the earlier 1958 Convention on the High Seas,<sup>24</sup> several other international conventions, and pertinent Security Council and General Assembly resolutions. In addition, several regional and sub-regional arrangements, along with national efforts, are ongoing to fight piracy.

*B. Applicable Conventions and Actions by the UN Security Council and General Assembly*

**1. Conventional Norms**

Customary international law on piracy is codified in the UN Convention on the Law of the Sea, which in section 100 obligates all states to cooperate to the fullest possible extent in repressing piracy “on the high seas or in any other place outside the jurisdiction of any State.”<sup>25</sup> Piracy is defined in article 101 to consist of “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.”<sup>26</sup> Such an act must take place on the high seas or outside the jurisdiction of any state and must be directed against another ship or aircraft, or the persons or property on board such vessel.<sup>27</sup>

It should be noted that the definition does not refer to either an attempt to commit an act of piracy or to conspiracy relating to such an act, but it does include voluntary participation or facilitation.<sup>28</sup> Also, criminal acts constituting piracy do not fall under the UNCLOS definition if they occur inside the territorial waters of a state, but are called “armed robbery at sea” or “armed robbery against ships.”<sup>29</sup> The IMO defines “armed robbery against ships” to mean any of the following acts:

1. any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State’s internal waters, archipelagic waters and territorial sea;<sup>30</sup>
2. any act of inciting or of intentionally facilitating an act described above.<sup>31</sup> State action is authorized within the state’s own exclusive economic zone.<sup>32</sup>

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*Piracy*, 104 AM. J. INT’L L. 436, 453 (2010).

23. United Nations Convention on the Law of the Sea arts. 100-07, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereafter UNCLOS].

24. *Id.*; Convention on the High Seas arts. 13-22, April 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

25. UNCLOS, *supra* note 23, art. 100.

26. *Id.* art. 101.

27. *Id.*

28. *Id.*

29. *Id.*

30. IMO, *Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships*, Annex ¶ 2.2.1, IMO Assemb. Res. A. 1025 (26) (Dec. 2, 2009); *see also* Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, arts. 3-4, Mar. 10, 1988, 1678 U.N.T.S. 221 [hereafter SUA Convention].

31. IMO, *Code of Practice*, *supra* note 30 ¶ 2.2.2. The Code of Practice adopts the UNCLOS

UNCLOS Article 105 authorizes any state to seize a pirate ship or aircraft and its property on board, arrest the crew, and prosecute them through its own courts, so long as the seizure takes place on the high seas or on waters outside the jurisdiction of any state.<sup>33</sup> Under Article 107 only warships or military aircraft or those on government service are authorized to undertake such seizures.<sup>34</sup>

It is noteworthy that while UNCLOS authorizes universal jurisdiction it does not make it obligatory for the states to take action.<sup>35</sup> Acts which would constitute piracy if committed on the high seas are referred to as "armed robbery at sea" when committed within the territorial waters of a state.<sup>36</sup> UNCLOS does not refer to armed robbery at sea, which falls under the coastal state's jurisdiction in whose territorial waters such acts are committed.<sup>37</sup>

Other conventions under which some acts of piracy may also be considered offenses include the 1988 SUA Convention, which was primarily intended to apply to acts of terrorism.<sup>38</sup> It may be recalled that this convention was adopted in the wake of the *Achille Lauro* incident in 1985, which involved an Italian flag cruise ship seized by a faction of the Palestine Liberation Organization.<sup>39</sup> The hijackers killed an elderly American citizen in a wheelchair and threw him overboard.<sup>40</sup> Since the incident did not involve two ships nor were the hijackers motivated "for private ends," the incident did not fit the UNCLOS definition of piracy; thus the gap was filled by the adoption of the SUA Convention, which only binds states parties since it has not yet attained the status of customary international law.<sup>41</sup>

The SUA Convention obligates states parties to establish a number of criminal offenses, most of which correspond at least in part with actions committed by pirates or armed robbers.<sup>42</sup> It especially mandates that a party

take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 when the offence is committed: (a) against or on board a ship flying the flag of the State at the time the

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definition of piracy. *Id.* ¶ 2.1. Earlier, in November 2001, the 22nd Assembly of the IMO had adopted a similar definition of "armed robbery against ships," as to mean "any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board such ship, within a State's jurisdiction over such offences." IMO, Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, Annex ¶ 2.2, IMO Assemb. Res. A. 922 (22) (Jan. 22, 2002) [hereinafter Piracy and Armed Robbery Against Ships Code].

32. UNCLOS, *supra* note 23, art. 58.

33. *Id.* art. 105.

34. *Id.* art. 107.

35. *Id.* art. 105.

36. *Id.* art. 101; *see also* Piracy and Armed Robbery Against Ships Code, *supra* note 31, Annex ¶¶ 2.1, 2.2.1.

37. Piracy and Armed Robbery Against Ships Code, *supra* note 31, Annex ¶¶ 2.1, 2.2; *see* UNCLOS, *supra* note 23, art. 101

38. SUA Convention, *supra* note 30, para. 3.

39. SUE MAHAN & PAMALA L. GRISET, *TERRORISM IN PERSPECTIVE* 139 (2d ed. 2008).

40. *Id.*

41. *See* SUA Convention, *supra* note 30, 222 n.1 (listing the parties to the SUA Convention).

42. *Id.* arts. 3, 5.

offence is committed; or (b) in the territory of that State, including its territorial sea; or (c) by a national of that State.<sup>43</sup>

It also authorizes non-state parties to establish jurisdiction when the person “seized, threatened, injured, or killed” is a national of that state and when the act is intended to “compel that State to do or abstain from doing any act.”<sup>44</sup>

Furthermore, the Convention obligates the state in whose territory the alleged offender is present to establish jurisdiction if it does not extradite the offender to one of the states that has established jurisdiction.<sup>45</sup> A special feature of the SUA Convention is that it does not require that two ships be involved, nor does it distinguish between maritime areas.<sup>46</sup> Thus, it fills the gaps left by the rather limited definition of piracy under UNCLOS.

In 2005, the states parties to the SUA Convention adopted a Protocol to the Convention that extensively amended the Convention to keep its legal framework up to date.<sup>47</sup> It added a new article on the procedures for a state party requesting the flag state of a suspect vessel for its authorization to board and search that vessel, its cargo, and persons on board, thus providing the necessary legal basis to states for intercepting acts of piracy.<sup>48</sup>

Other applicable conventions include the 1979 International Convention Against the Taking of Hostages,<sup>49</sup> the 1999 International Convention for the Suppression of the Financing of Terrorism,<sup>50</sup> and the 2000 United Nations Convention Against Transnational Organized Crime.<sup>51</sup>

## 2. Response by the United Nations

### a. Security Council

As the incidents of piracy increased in 2008, the UN Security Council, acting under Chapter VII, adopted several resolutions to counter piracy and armed robbery at sea.<sup>52</sup> That year it adopted more resolutions on piracy than on any other

43. *Id.* art. 6, ¶ 1.

44. *Id.* art. 6, ¶ 2.

45. *Id.* art. 6, ¶ 4.

46. *See id.* arts. 3-4.

47. IMO, Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, pmbl., IMO Doc. LEG/CONF.15/21, Nov. 1, 2005, S. TREATY DOC. No. 110-8 (2007) (entered into force July 28, 2010), *available at* <http://www.state.gov/documents/organization/87452.pdf>. The US Congress has yet to adopt the necessary implementing legislation.

48. *Id.* art. 8*bis*.

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

50. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, T.I.A.S. No. 13,075.

51. United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, T.I.A.S. No. 13,127, 2225 U.N.T.S. 209.

52. *See* S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009); S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008); S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).



subject. In Resolution 1816,<sup>53</sup> adopted on June 2, 2008, it authorized member states cooperating with the Transitional Federal Government (TFG) to take action against pirates, even in Somalia's territorial waters ("hot pursuit"), for a period of six months.<sup>54</sup> This authorization was extended for one year under Security Council Resolutions 1846 of December 2, 2008,<sup>55</sup> and 1851 of December 16, 2008.<sup>56</sup> Subsequently, Resolution 1897 of November 30, 2009, further extended the scope of permissible military force in Somalia's territorial waters for another twelve months, and broadened the definition of piracy to include certain land-based operations on the Somali mainland.<sup>57</sup>

The Security Council also noted in Resolution 1846 that the SUA Convention "provides for parties to create criminal offenses, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat [of force] or any other form of intimidation," and thus it urged states parties to the SUA Convention to fully implement their obligations under the Convention, including cooperating with the IMO to "build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia."<sup>58</sup>

On December 16, 2008, the Security Council passed Resolution 1851, under which it decided that states and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia could "undertake all necessary measures that are appropriate in Somalia, for the purposes of suppressing acts of piracy and armed robbery at sea," in accordance with applicable human rights law and international humanitarian law.<sup>59</sup>

Subsequently, in Resolution 1897 of November 30, 2009, it renewed its call upon states and regional organizations that have the capacity to do so to deploy

53. S.C. Res. 1816, *supra* note 52.

54. *Id.* ¶ 7.

55. S.C. Res. 1846, *supra* note 52, ¶ 10.

56. S.C. Res. 1851, *supra* note 52, ¶ 6.

57. S.C. Res. 1897, *supra* note 52, ¶ 7 ("[D]ecid[ing] that for a period of twelve months from the date of this resolution to renew the authorizations as set out in paragraph 10 of Resolution 1846 (2008) and paragraph 6 of Resolution 1851 (2008) granted to States and regional organizations cooperating with the TFG [Transitional Federal Government] in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General."); *see* S.C. Res. 1897, *supra* note 52, ¶ 2 (noting that escalating ransom payments and lack of enforcement of the 1992 arms embargo contribute to piracy in off the coast of Somalia).

58. S.C. Res. 1846, *supra* note 52, ¶ 15; *see also UN Experts Report on Somali Piracy*, *supra* note 4, § 4.2.4.1:

The SUA Convention provides a legal basis to effect the rapid transit ashore of pirates captured at sea where both the flag State and the receiving State are States Parties to SUA. The receiving State Party to SUA is required to make an immediate inquiry into the facts, and to notify other State Parties that might have jurisdiction as to whether it intends to exercise its jurisdiction. The receiving State Party is required to extradite such offenders to another State Party with jurisdiction or to submit the case to its competent authorities for the purpose of prosecution.

59. S.C. Res. 1851, *supra* note 52, ¶ 6.

“naval vessels, arms and military aircraft” and seize and dispose of “boats, vessels arms and other related equipment used in the commission of piracy and armed robbery at sea off the coast of Somalia, or for which there are reasonable grounds for suspecting such use.”<sup>60</sup> It also emphasized the need to build judicial capacity for the successful prosecution of operative paragraph 14.<sup>61</sup>

Finally, in Resolution 1918, adopted on April 27, 2010, the Security Council called on member states to criminalize piracy under their domestic laws and to favorably consider the prosecution and imprisonment of suspected pirates.<sup>62</sup> It also requested the Secretary General to present within three months a report on possible options to further the aim of prosecuting and imprisoning those responsible for acts of piracy off the coast of Somalia,

including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the CGPCS [Contact Group on Piracy Off the Coast of Somalia], the existing practice in establishing international and mixed tribunals, and the time and the resources necessary to achieve and sustain substantive results.<sup>63</sup>

In response to the request from the Security Council, the Secretary General presented a report on July 26, 2010,<sup>64</sup> identifying seven options for the Security Council’s consideration. The first option calls for the UN to enhance assistance to build the capacity of regional states to prosecute and imprison suspected pirates.<sup>65</sup> This the UN is already doing through the work of the United Nations Office on Drugs and Crime (UNODC), the United Nations Development Programme (UNDP), and others, in assisting prosecutions and imprisonments in regional states.<sup>66</sup>

The second option<sup>67</sup> involves establishment of a Somali court sitting in the territory of another regional state and applying Somali law, either with or without the United Nations’ participation. This option derives from the example of the *Lockerbie* Court, which did not have participation from either the UN or a regional organization.<sup>68</sup> The necessary arrangements would have to be made through negotiations between Somalia and the host state. If the United Nations was to participate it would also require agreement between the UN, Somalia, and the host state. However, as Somalia currently faces instability and other major challenges, including that of its judicial system, there are no realistic prospects for the implementation of this option, which therefore has to be a plan for the future.

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60. S.C. Res. 1897, *supra* note 52, ¶ 3.

61. *Id.* ¶ 14.

62. S.C. Res. 1918, *supra* note 52, ¶ 2, U.N. Doc. S/RES/1918 (Apr. 27, 2010).

63. *Id.* ¶ 4.

64. *SG’s Report*, *supra* note 1.

65. *Id.* pt. V(B).

66. *Id.* pt. V(B), ¶ 55.

67. *Id.* pt. V(B).

68. *Id.* pt. V(B), ¶ 62.

Option three<sup>69</sup> envisages the establishment of a special chamber within the national jurisdiction of a state or states in the region, without UN participation, while the fourth option<sup>70</sup> is the same arrangement but with UN participation. It does not seem that in the near future either of these options holds great promise. Somalia, as a failed state, lacks judicial capacity, although Kenya, Seychelles, the United Republic of Tanzania, and Mauritius have judicial capacity in the region to establish a special chamber,<sup>71</sup> the cost involved and the logistics, with or without the UN's participation, will present formidable hurdles to be overcome.

Option five<sup>72</sup> consists of a regional tribunal, not embedded in a national jurisdiction but established on the basis of a multilateral agreement among regional states and with the UN's participation. An agreement with the United Nations would, however, be needed with this option, regarding the selection of judges, prosecutors, etc. The sixth option<sup>73</sup> is an international tribunal on the basis of an agreement between the United Nations and a state in the region. This would be along the lines of the Special Court for Sierra Leone and the Special Tribunal for Lebanon.<sup>74</sup>

Finally, the seventh option<sup>75</sup> establishes an international tribunal by Security Council resolution under Chapter VII of the UN Charter. The UN's participation in the creation of a new judicial mechanism would require a Security Council resolution requesting the Secretary General to negotiate an agreement with the state concerned.<sup>76</sup>

The Security Council considered the Secretary General's options in a meeting on August 25, 2010, in which the Council commended the ongoing efforts of states, especially Kenya and Seychelles, to prosecute suspected pirates in their national courts, and commended UNODC and other international entities assisting these countries to prosecute suspected pirates in their national courts.<sup>77</sup> It also emphasized that it was necessary to have "peace, stability, development and respect for human rights in Somalia" in order to find durable eradication of piracy and armed robbery at sea off its coast.<sup>78</sup> It asked the Contact Group on Piracy Off the Coast of Somalia (CGPCS) to consider the "advantages and disadvantages of the various options" suggested by the Secretary General, Ban Ki Moon.<sup>79</sup>

Mr. Ban appointed former French Culture Minister and Education Minister,

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69. *Id.* pt. V(B).

70. *Id.* pt. V(B).

71. *Id.* pt. IV(B), ¶ 27.

72. *Id.* pt. V(B).

73. *Id.* pt. V(B).

74. *Id.* pt. V(B), ¶ 90.

75. *Id.* pt. V(B).

76. *Id.* pt. V(B), ¶ 97.

77. Press Release, U.N. Dep't of Pub. Info., Security Council Stresses Long-Term Solution Needed to Problem of Prosecuting, Imprisoning, Pirates Operating Off Somalia's Coast, Welcomes Report on Issue, U.N. Press Release SC/10014 (Aug. 25, 2010), available at <http://157.150.195.10/News/Press/docs/2010/sc10014.doc.htm>.

78. *Id.*

79. *Id.*

Jacques Lang, to advise him on legal issues relating to piracy off Somalia.<sup>80</sup> Devising an effective mechanism for prosecuting captured pirates and their imprisonment is certainly one such important issue claiming the new adviser's attention.

b. General Assembly

The General Assembly has considered piracy on an annual basis as part of its discussions on "oceans and the law of the sea." In the latest such resolution from December 4, 2009,<sup>81</sup> the UN General Assembly adopted a comprehensive Resolution on Oceans and the Law of the Sea, similar to another resolution it had adopted a year earlier.<sup>82</sup> Several provisions relate to piracy. Among others, the resolution states:

[T]he crucial role of international cooperation at the global, regional, subregional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy, armed robbery at sea, terrorist acts against shipping, offshore installations and other maritime interests, through bilateral and multilateral instruments and mechanisms aimed at monitoring, preventing and responding to such threats, the enhanced sharing of information among States relevant to the detection, prevention and suppression of such threats, and the prosecution of offenders with due regard to national legislation, and the need for sustained capacity-building to support such objectives.<sup>83</sup>

After noting that piracy affects the entire range of vessels engaged in maritime activities, the resolution emphasizes the "importance of promptly reporting piracy incidents to enable accurate information on the scope of the piracy problem,"<sup>84</sup> and "[c]alls upon States to take appropriate steps under their national laws so as to facilitate" apprehending and prosecuting suspected pirates.<sup>85</sup> It also urges states to "actively combat piracy" in cooperation with the IMO by adopting measures to bring the "alleged perpetrators to justice."<sup>86</sup> Responding to the concern of some states, it notes that the Security Council resolutions authorizing state action in the territorial waters of Somalia and inland do not establish customary international law and apply only to the situation in Somalia.<sup>87</sup>

C. *Response by the IMO, UNODC, UNDP, and Regional and Subregional Groups*

**1. Response by the IMO and Other Intergovernmental Organizations**

The IMO is a specialized agency of the United Nations that works in cooperation with the shipping industry and nongovernmental organizations,<sup>88</sup> and

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80. *Id.*

81. G.A. Res. 64/71, U.N. Doc. A/RES/64/71 (Mar. 12, 2010).

82. *Id.*; G.A. Res. 63/111, U.N. Doc. A/RES/63/111 (Feb. 12, 2009).

83. G.A. Res. 64/71, *supra* note 81, ¶ 69.

84. *Id.* ¶ 71.

85. *Id.* ¶ 72.

86. *Id.* ¶ 73.

87. *Id.* ¶ 77.

88. *Introduction to IMO*, IMO, <http://www.imo.org/About/Pages/Default.aspx> (2010).

is the most effective organization in fighting piracy. Its activities pertaining to piracy began as early as 1983, when the IMO Assembly adopted a resolution on measures to prevent acts of piracy and armed robbery against ships.<sup>89</sup> Since then, and especially since the 1990s, it has very actively and effectively addressed the question of maritime piracy.

The IMO's initiatives have resulted in the establishment of several regional and subregional arrangements aimed at preventing, deterring, and repressing acts of piracy and armed robbery against ships.<sup>90</sup> These include the 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery (ReCAAP); the 2008 Sub-Regional Coast Guard Network for the West and Central African Regions, under the auspices of the Maritime Organization for West and Central Africa (MOWCA); and the 2009 Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden (Djibouti Code of Conduct).<sup>91</sup> Another important initiative is the IMO's effort to improve maritime security, safety, and environmental protection in the Straits of Malacca and Singapore, which resulted in the 2007 Singapore Statement.<sup>92</sup>

In addition to these initiatives creating regional arrangements, two recent important sets of guidelines for effectively fighting piracy are noteworthy. First, in September 2009, the IMO's Maritime Safety Committee updated its guidance on combating piracy and armed robbery against ships and adopted a set of "best management practices" to deter such attacks.<sup>93</sup> The guidelines include several recommendations related to travel routes and more technical advice regarding preferred modes of communication and reporting, evasive maneuvering tactics, and other defensive measures.<sup>94</sup> Second, in December 2009, the IMO adopted a guidance document in the form of the Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships<sup>95</sup> to foster regional cooperation and to coordinate governments' actions.

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89. IMO, *Measures to Prevent Acts of Piracy and Armed Robbery Against Ships*, IMO Assemb. Res. A. 545 (13) (Nov. 17, 1983).

90. Regional Cooperation Agreement on Combating Piracy and Armed Robbery in Southeast Asia art. 2, ¶ 1, Apr. 28, 2005, 44 I.L.M. 829 [hereinafter ReCAAP]; IMO, *Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden*, Annex, IMO Council Doc. C 102/14 (Apr. 3, 2009), available at <http://www.imo.org/OurWork/Security/PIU/Documents/DCoC%20English.pdf> [hereinafter *Djibouti Code of Conduct*]; *About MOWCA*, MAR. ORG. OF W. & CENT. AFR. [MOWCA], <http://www.mowca.org/new%20design/about-mowca.html> (last visited Nov. 10, 2010).

91. ReCAAP, *supra* note 90; *Djibouti Code of Conduct*, *supra* note 90; MOWCA, *supra* note 90.

92. IMO, *Singapore Statement on Enhancement of Safety, Security and Environmental Protection in the Straits of Malacca and Singapore*, IMO Doc. IMO/SGP 1/4 (Sept. 6, 2007), available at [www.mpa.gov.sg/sites/pdf/spore\\_statement.pdf](http://www.mpa.gov.sg/sites/pdf/spore_statement.pdf) [hereinafter *Singapore Statement*].

93. IMO, *Piracy and Armed Robbery Against Ships in Waters Off the Coast of Somalia: Best Management Practices to Deter Piracy in the Gulf of Aden and Off the Coast of Somalia Developed by the Industry*, ¶¶ 5-6, IMO Doc. MSC.1/Circ.1335 (Sept. 29, 2009).

94. *Id.* Annex 2.

95. IMO, *Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships*, Annex, IMO Assemb. Res. A. 1025 (26) (Jan. 18, 2010).

Among other UN bodies, UNODC set up its program to support piracy prosecutions in May 2009.<sup>96</sup> The organization's assistance is especially focused on Kenya and Seychelles, although it has also provided support in the Puntland and Somaliland regions of Somalia.<sup>97</sup> UNODC has trained police in modern investigatory procedures and supplied the police with cars, offices, etc.<sup>98</sup> In Kenya, it has supported the criminal justice system; it has trained the judiciary and renovated courtrooms, introduced computers and provided defense lawyers; it has refurbished prisons, providing medical facilities among other improvements; and has undertaken similar capacity building and support programs in Seychelles, where the European Commission has entered into partnership with it.<sup>99</sup> The UNDP has been engaged in training for the judiciary and police and has also supported court infrastructure in each of the regions of Somalia.<sup>100</sup>

## 2. Regional and Subregional Groups

### a. The 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP)

The Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP),<sup>101</sup> signed in 2004 and in force since September 4, 2006, was a pioneering attempt at a regional arrangement aimed exclusively at fighting piracy and armed robbery in the Malacca and Singapore Straits, another major area then being targeted by pirates. Japan played a leading role in bringing the states together by issuing the "Tokyo Appeal" in March 2000 and "Tokyo Action Plan" the following month.<sup>102</sup>

Under the treaty, the sixteen states parties<sup>103</sup> are to "make every effort to take effective measures" in preventing and suppressing piracy and armed robbery against ships, arresting pirates or those who have committed armed robbery against ships, seizing ships or aircraft used in committing such acts, as well as ships taken by them and the property on board such ships, and rescuing victim ships and victims of such acts.<sup>104</sup>

The member states agreed in the ReCAAP initiative to enhance their multilateral cooperation in three areas: sharing of information regarding piracy (the Information Sharing Centre (ISC)) by coordinating communications and exchange of information, expediting responses to attacks, and recording and analyzing

96. United Nations Office on Drugs and Crime (UNODC), *Counter Piracy Programme*, at 3 (Nov. 2009), available at [http://www.unodc.org/documents/easternafrika/piracy/UNODC\\_Counter\\_Piracy\\_Programme.pdf](http://www.unodc.org/documents/easternafrika/piracy/UNODC_Counter_Piracy_Programme.pdf).

97. *Id.*

98. *Id.*

99. *Id.* at 6-7.

100. *SG's Report*, *supra* note 1, pt. IV(B), ¶ 28.

101. ReCAAP, *supra* note 90.

102. *Id.* para. 5.

103. The parties are Bangladesh, Brunei, Cambodia, People's Republic of China, India, Indonesia, Japan, South Korea, Laos, Malaysia, Myanmar, Philippines, Singapore, Sri Lanka, Thailand, and Vietnam. ReCAAP, *supra* note 90, art. 18, ¶ 1.

104. *Id.* art 3.

statistics, all through a secure web-based information network system;<sup>105</sup> improving the anti-piracy capabilities of the member states through exercises, training workshops, and programs for technical assistance to share best practices among the members; and establishing cooperative arrangements for fighting piracy, such as between “governmental, intergovernmental, and nongovernmental organisations” and institutes doing relevant research, to which it gives the status of “partner organisations.”<sup>106</sup>

As this arrangement was so successful in preventing and deterring piracy in the region, the IMO in November 2007 called upon East African states to adopt a similar agreement to fight piracy.<sup>107</sup> The IMO sponsored meetings in Yemen, Oman, and Tanzania to explore the possibility of creating such an arrangement among states in the Western Indian Ocean.<sup>108</sup> The UN Security Council recommended in its Resolution 1851 that Eastern African states follow this example to coordinate their activities in the Horn of Africa; the outcome was the 2009 Djibouti Code of Conduct,<sup>109</sup> which will be discussed below.

#### b. The 2007 Singapore Statement

This IMO initiative began in Jakarta, Indonesia, in September 2005.<sup>110</sup> It continued with a meeting in Kuala Lumpur, Malaysia, in September 2006,<sup>111</sup> followed by a meeting in Singapore in September 2007, where states signed the Singapore Statement on Enhancement of Safety, Security and Environmental Protection in the Straits of Malacca and Singapore.<sup>112</sup> The states parties affirmed that “the primary responsibility over the safety of navigation, environmental protection and maritime security in the Straits lies with the littoral States,”<sup>113</sup> and agreed to continue their efforts toward “enhancing maritime security in the Straits.”<sup>114</sup> This regional arrangement among Indonesia, Malaysia, and Singapore, and subsequently Thailand, was primarily responsible for curbing piracy in that region.

105. *Id.* arts. 7, 9-10; see also RECAAP ISC, [http://www.recaap.org/index\\_home.html](http://www.recaap.org/index_home.html) (last visited Nov. 12, 2010).

106. RECAAP ISC, *supra* note 105, *Cooperative Arrangements*.

107. IMO, *Piracy and Armed Robbery Against Ships in Waters Off the Coast of Somalia*, ¶ 7, IMO Assemb. Res. A. 1002 (25) (Dec. 6, 2007) (adopted Nov. 29, 2007).

108. IMO, *Report of the Maritime Safety Committee on its Eighty-Fifth Session*, ¶ 18.13, IMO Doc. MSC 85/26 (Dec. 19, 2008).

109. S.C. Res. 1851, *supra* note 52 ¶¶ 4-5, U.N. Doc. S/RES/1851 (Dec. 16, 2008); *Djibouti Code of Conduct*, *supra* note 90, para. 6.

110. IMO, *Jakarta Statement on Enhancement of Safety, Security and Environmental Protection in the Straits of Malacca and Singapore*, Annex 2, IMO Doc. IMO/JKT 1/2, C/ES.23/8 (Sept. 8, 2005), available at <http://www.sjofartsverket.se/upload/5926/23-8.pdf>.

111. IMO, *Kuala Lumpur Statement on Enhancement of Safety, Security and Environmental Protection in the Straits of Malacca and Singapore*, IMO Doc. IMO/KUL 1/4 (Sept. 20, 2006), available at [www.imo.org/includes/blastDataOnly.asp/data\\_id%3D15677/kualalumpurstatement.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D15677/kualalumpurstatement.pdf).

112. *Singapore Statement*, *supra* note 92.

113. *Id.* at 3.

114. *Id.* at 5.

c. The 2008 Sub-Regional Coast Guard Network for the West and Central African Regions under the Auspices of MOWCA.

MOWCA comprises 20 coastal and five landlocked countries from Mauritania to Angola.<sup>115</sup> An intergovernmental institution based in Abidjan, Cote d'Ivoire, MOWCA was established in May 1975 and its long-term objective is to provide "profitable maritime and auxiliary services, with greater security, more safety and less pollution."<sup>116</sup> Several developed countries and international organizations, including the IMO and the AU, support MOWCA's efforts.<sup>117</sup> Among its projects and programs are the establishment of maritime safety and security, marine environmental protection, and the creation of an "institutional framework for cooperation and integration."<sup>118</sup> Since 1999, one of its major projects has been to protect vessels from piracy, along with terrorism and pollution.<sup>119</sup>

In July 2008, through a Memorandum of Understanding, MOWCA established a Sub-Regional Integrated Coast Guard Network in West and Central Africa,<sup>120</sup> aimed at combating piracy and armed robbery; enhancing maritime safety, security, and search and rescue; and marine environmental protection in the coastal waters.<sup>121</sup> This is a comprehensive agreement under which parties have assumed obligations to coordinate their national legislation, practices and procedures, and policies related to safeguarding maritime trade, providing security for safe operation of port facilities and ships, and effective protection of the marine environment.<sup>122</sup> They are also obligated to prosecute "perpetrators of all forms of piracy and unlawful acts against seafarers, ships, port facility personnel and port facilities,"<sup>123</sup> and to establish the Maritime Fund in each member state.<sup>124</sup>

Parties make the obligation at the regional level "to combat piracy, armed robbery against ships, unlawful acts and transnational organized crime at sea by enhancing the regional maritime security strategies and multilateral co-operation in their implementation;"<sup>125</sup> to take effective cooperative measures so that pirates do

115. MOWCA, *supra* note 90.

116. *Id.* pt. IV.

117. *Id.*

118. *Projects & Programs*, MOWCA, [www.mowca.org/new%20design/projects-programs.html](http://www.mowca.org/new%20design/projects-programs.html) (last visited Nov. 10, 2010).

119. *Id.*

120. Memorandum of Understanding on the Establishment of a Sub-Regional Integrated Coast Guard Network in West and Central Africa, 13th Sess., July 29-31, 2008, MOWCA Doc. MOWCA/XIII GA.08/8, available at [http://www.mowca.org/new%20design/MOWCA%20draft%20final%20E%20and%20F\[1\]\\_doc%20Addico%20final.rtf](http://www.mowca.org/new%20design/MOWCA%20draft%20final%20E%20and%20F[1]_doc%20Addico%20final.rtf) [hereinafter MOWCA MOU].

121. *Strategy of MOWCA Sub-Region in Suppressing Piracy, Armed Robbery and Other Unlawful Acts Against Shipping, Responding to Maritime Accidents and Protecting the Marine Environment*, MOWCA, [www.mowca.org/new%20design/strategyofmowcamemberstatesoncoastguard.html](http://www.mowca.org/new%20design/strategyofmowcamemberstatesoncoastguard.html) (last visited Nov. 10, 2010).

122. MOWCA MOU, *supra* note 120, art. 4, ¶ 1.

123. *Id.* art. 4, ¶ 5.

124. *Id.* art. 4, ¶ 6.

125. *Id.* art. 6, ¶ 4.



not evade prosecution, conviction, and punishment;<sup>126</sup> to share information and ensure naval cooperation; and to become parties to and implement the pertinent international conventions, including the 1988 SUA Convention and its 1988 and 2005 protocols.<sup>127</sup>

The network comprises four coast guard zones with four zonal coordinating centers and two principal coordinating centers.<sup>128</sup> “States Parties recognize the right of hot pursuit.”<sup>129</sup> MOWCA’s institutional arrangements indeed are an exemplary model for other regions.

#### d. The Djibouti Code of Conduct

An important regional instrument, the Djibouti Code of Conduct was developed under the auspices of the International Maritime Organization (IMO) on January 29, 2009.<sup>130</sup> Sixteen regional states, signatories to the Djibouti Code,<sup>131</sup> a nonbinding instrument, have declared their intention to review their national legislation “with a view towards ensuring that there are national laws in place to criminalize piracy and armed robbery against ships, and adequate guidelines for the exercise of jurisdiction, conduct of investigations, and prosecutions of alleged offenders.”<sup>132</sup> The signatory states have also committed to “facilitate coordinated, timely, and effective information flow” among themselves through a system of national focal points and information centers.<sup>133</sup>

### *D. Response by NATO, the EU, Coalitions of States, and National Efforts*

#### **1. Introduction**

The international community has responded to the growing threat of piracy in the Gulf of Aden and off the Somali coast by undertaking naval operations to deter pirates and to ensure the safety of commercial maritime routes and international navigation. These operations have been coordinated by NATO, the EU, and a coalition led by the United States, in addition to several countries operating on their own. Apart from the naval response there have been numerous coordinated efforts, as well as by states acting alone, at capacity building in affected countries to strengthen their criminal justice systems so that pirates can be apprehended, prosecuted, and convicted.

#### **2. NATO**

Pursuant to the request of UN Secretary General Ban Ki Moon, NATO provided escorts to the UN World Food Programme vessels transiting through the

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126. *Id.* art. 6, ¶¶ 6-7.

127. *Id.* art. 6, ¶¶ 2, 10.

128. *Id.* art. 12.

129. *Id.* art. 55.

130. *Djibouti Code of Conduct*, *supra* note 90, ¶ 7.

131. The signatories are Comoros, Djibouti, Egypt, Ethiopia, Jordan, Kenya, Madagascar, Maldives, Mauritius, Oman, Saudi Arabia, Seychelles, Somalia, Sudan, United Republic of Tanzania, and Yemen. *Signatory States*, IMO, <http://www.imo.org/OurWork/Security/PIU/Pages/Signatory-States.aspx> (last visited Nov. 10, 2010).

132. *Djibouti Code of Conduct*, *supra* note 90, art. 11.

133. *Id.* art. 8.

Gulf of Aden and off the Horn of Africa under Operation Allied Provider between October and December 2008, in order to provide humanitarian aid to Somalia.<sup>134</sup> In March 2009, NATO expanded its role in counter-piracy efforts with the launching of the successor Operation Allied Protector to contribute to the “safety of commercial maritime routes and international navigation” by helping to deter, defend against, and disrupt pirate activities in the area.<sup>135</sup> Canada, Denmark, Germany, the Netherlands, Norway, Portugal, Spain, and the United States routinely contributed to the NATO naval force conducting the operation.<sup>136</sup>

That operation lasted until August 2009 and since that time NATO has been conducting Operation Ocean Shield.<sup>137</sup> The Alliance has broadened its mission to include assistance to regional states at their request to develop their own capacity, such as strengthening their local coast guard, to combat piracy activities.<sup>138</sup>

### 3. European Union

The European Union’s operation EU-NAVFOR Somalia, known as operation “Atalanta,” is conducted in support of UN Security Council resolutions 1814, 1816, 1838, 1846, and 1897.<sup>139</sup> According to the EU Council Decision of December 8, 2008, the EU’s first ever maritime operation was launched “to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.”<sup>140</sup> The operation became fully operational in February 2009. Specifically, it has responsibility for ensuring the protection of 1) shipments of the World Food Programme carrying food aid to displaced persons in Somalia and 2) vulnerable cruising vessels off the Somali coast.<sup>141</sup> In general, its objective is to deter, prevent, and repress acts of piracy and armed robbery at sea in that area.<sup>142</sup> On June 14, 2010, the Council of the EU decided to extend the mandate of the Operation until December 12, 2012.<sup>143</sup> The Operation has taken the leading role in the SHADE (Shared Awareness and Deconfliction) mechanism to promote coordination among international, regional, and national naval forces operating in the area.<sup>144</sup>

In the first EU-NAVFOR operation to result in court judgment, a Mombasa Law Courts Chief Magistrate sentenced seven Somali pirates who were apprehended by a EU-NAVFOR warship after they attacked a German naval

134. *Counter-Piracy Operations*, N. ATL. TREATY ORG. (NATO), <http://www.nato.int/issues/allied-provider/index.html> (last updated Apr. 2, 2009).

135. *Id.*

136. *Id.*

137. *Operation Ocean Shield*, NATO, <http://www.aco.nato.int/page208433730.aspx?print=Y>.

138. *Id.*

139. *EU Common Security and Defense Policy: EUNAVFOR Somalia*, COUNCIL OF THE EUROPEAN UNION, [www.consilium.europa.eu/showPage.aspx?id=1518&lang=en](http://www.consilium.europa.eu/showPage.aspx?id=1518&lang=en) (last visited Nov. 15, 2010).

140. Council Decision 2008/918, 2008 O.J. (L 330) 19 (EU), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:330:0019:0020:EN:PDF>.

141. *EU Common Security and Defense Policy: EUNAVFOR Somalia*, *supra* note 139.

142. *Id.*

143. *Id.*

144. *Id.*

tanker.<sup>145</sup> As of September 2010, EU-NAVFOR had transferred 75 suspects to Kenyan authorities for prosecution on piracy charges.<sup>146</sup>

An initiative established by EU-NAVFOR with close collaboration from industry, the Maritime Security Centre—Horn of Africa (MSCHOA), is designed as a coordinating center to provide a service to mariners in the Gulf of Aden, the Somali Basin, and off the Horn of Africa.<sup>147</sup> This it does by safeguarding freedom of navigation, in the light of increasing piracy attacks, in support of UN Security Council's resolutions 1814, 1816, 1838, and 1846.<sup>148</sup> Military and merchant navy personnel from several countries operate the Centre, and ship owners and ship masters register their movements through the region with MSCHOA and receive information and guidance to reduce the risk of pirate attacks.<sup>149</sup>

#### 4. Combined Task Force 151

Combined Task Force 151 (CTF-151) is a “multinational task force established in January 2009” to conduct counter-piracy operations off the Eastern coast of Somalia and in the Gulf of Aden,<sup>150</sup> “covering an area of approximately 1.1 million square miles.”<sup>151</sup> The Task Force operates under a mandate of the 25-nation Combined Maritime Forces (CMF), which patrols approximately “2.5 million square miles of international waters” to ensure safety of the seas in that area.<sup>152</sup> It does this essentially by fighting terrorism, preventing piracy, and reducing illegal trafficking.<sup>153</sup> CTF-151's primary responsibility, to actively deter and suppress piracy, is aimed at protecting global maritime security and securing international freedom of “navigation for the benefit of all nations.”<sup>154</sup>

To illustrate one of the Task Force's many activities to deter piracy, US Marines operating in the Gulf of Aden boarded a German-owned vessel, M/V Magellan Star, on September 9, 2010, and seized control from pirates who had attacked and boarded the vessel a day earlier.<sup>155</sup> The Marines returned control of the ship to the civilian mariners, ensuring safety of the ship's crew.<sup>156</sup> There were

145. Press Release, Eur. Union Naval Force Pub. Affairs Office, Verdict for the First EU NAVFOR Case in Kenya (Sept. 7, 2010), available at <http://www.eunavfor.eu/2010/09/verdict-for-the-first-eunavfor-case-in-kenya/> [hereinafter EU NAVFOR Press Release].

146. *Id.*

147. *About MSCHOA and OP ATALANTA*, MAR. SEC. CTR. HORN OF AFR., <http://www.mschoa.org/Pages/About.aspx> (last visited Nov. 15, 2010).

148. *Id.*

149. *Id.*

150. *Combined Task Force (CTF) 151*, COMBINED MAR. FORCES, <http://www.cusnc.navy.mil/cmff/151/index.html> (last visited Nov. 16, 2010).

151. *Id.*

152. *Combined Maritime Forces*, COMBINED MAR. FORCES, [http://www.cusnc.navy.mil/cmff/cmff\\_command.html](http://www.cusnc.navy.mil/cmff/cmff_command.html) (last visited Nov. 16, 2010).

153. *Id.*

154. *Combined Task Force (CTF) 151*, *supra* note 150.

155. Jeffrey Gettleman & Eric Schmitt, *U.S. Marines Free Ship and Capture Somali Pirates Without Bloodshed*, N.Y. TIMES, Sept. 10, 2010, at A4; Press Release, U.S. Naval Forces Cent. Command, Maritime Raid Force Recaptures Ship from Pirates (Sept. 9, 2010), available at [www.cusnc.navy.mil/articles/2010/104.html](http://www.cusnc.navy.mil/articles/2010/104.html).

156. Gettleman & Schmitt, *supra* note 155; U.S. Naval Forces Cent. Command, *supra* note 155.

no injuries and nine pirates were captured, remaining under “control of CTF-151, pending further disposition.”<sup>157</sup>

### 5. The Contact Group on Piracy Off the Coast of Somalia

Following the adoption of Security Council Resolution 1851, the United States took the lead in creating the Contact Group on Piracy Off the Coast of Somalia on January 14, 2009.<sup>158</sup> The primary objective is to coordinate an effective international response to piracy in that region. This is a voluntary international forum that has brought together almost 50 countries and several international organizations—the African Union, the League of Arab States, INTERPOL, IMO, NATO, and the UN Secretariat—as well as two major maritime industry groups that take part as observers.<sup>159</sup> The participants have established four working groups: military and operational coordination, information sharing, and capacity building, chaired by the United Kingdom; legal issues, chaired by Denmark; commercial industry coordination, chaired by the United States; and public information, chaired by Egypt.<sup>160</sup>

At the sixth plenary meeting of the Contact Group at the UN Headquarters in New York on June 10, 2010,<sup>161</sup> participants agreed that, for a viable solution for ending piracy, the root causes on land have to be addressed effectively, and thus they emphasized the need for regional capacity building.<sup>162</sup> The meeting underlined the central importance of adherence to the Best Management Practices guide, whose purpose is to “assist ships to avoid, deter, or delay piracy attacks” in the area.<sup>163</sup> The Contact Group stated that international efforts to restrict support for pirates should include “tracking and freezing” pirates’ assets to deter their operations.<sup>164</sup>

In January 2010, the Contact Group established a Trust Fund to help countries in the region fight piracy, the main objective of which is to “build capacity in their criminal-justice systems so they can prosecute” suspected pirates.<sup>165</sup> Then, in April, the Board of the Trust Fund decided to undertake five projects focused primarily on efforts to prosecute suspected pirates. Four of these projects are designed to help strengthen institutions in Seychelles and the autonomous Somali

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157. U.S. Naval Forces Cent. Command, *supra* note 155.

158. Press Release, U.S. Dep’t of State, Contact Grp. on Piracy Off the Coast of Som. (May 18, 2009), available at <http://www.state.gov/r/pa/prs/ps/2009/05/123584.htm>.

159. *Id.*

160. *Id.*

161. See Press Release, U.S. Dep’t of State, Sixth Plenary Meeting of the Contact Group on Piracy Off the Coast of Som. (June 11, 2010), available at [www.state.gov/r/pa/prs/ps/2010/06/143010.htm](http://www.state.gov/r/pa/prs/ps/2010/06/143010.htm) [hereinafter Plenary Meeting].

162. *Id.*

163. BIMCO ET AL., BEST MANAGEMENT PRACTICE 3: PIRACY OFF THE COAST OF SOMALIA AND ARABIAN SEA AREA 1 (3d version, 2010), available at [www.marad.dot.gov/documents/Piracy\\_Best\\_Management\\_Practices\\_3.pdf](http://www.marad.dot.gov/documents/Piracy_Best_Management_Practices_3.pdf).

164. Plenary Meeting, *supra* note 161.

165. Press Conference, U.N. Dep’t of Pub. Info., Press Conference on Work of Contact Grp. on Piracy Off Somali Coast (Jan. 28, 2010), [http://www.un.org/News/briefings/docs/2010/100128\\_Somalia.doc.htm](http://www.un.org/News/briefings/docs/2010/100128_Somalia.doc.htm).

regions of Puntland and Somaliland relating to “mentoring prosecutors and police, building and renovating prisons, reviewing domestic laws in piracy and increasing the capacity of local courts.”<sup>166</sup> The fifth project is designed to help local media disseminate anti-piracy messages within Somalia.

## 6. National Legal Responses

Several states have enacted laws to criminalize piracy and to prosecute alleged pirates in their courts. These include Kenya and Seychelles in Africa, several European countries, and the United States. The UN Secretary-General noted in his report that ten states are currently prosecuting acts of piracy.<sup>167</sup>

### a. Africa and Europe

Pursuant to Security Council Resolution 1851 of December 16, 2008, which had urged states and regional organizations to conclude special agreements with countries willing to take custody of and prosecute pirates, Kenya entered into several agreements—with the European Union, the United Kingdom, the United States, Denmark, China, and Canada.<sup>168</sup> It would be desirable if more states in the region would allow prosecutions of pirates in their courts, but no such additional agreements have been reached as of September 2010.

In April 2010, the Kenyan government announced that it would no longer prosecute pirates because its legal system was overburdened and the international community had not provided sufficient support.<sup>169</sup> However, Kenya subsequently resumed the adjudication of piracy cases in May after receiving assurances of additional support.<sup>170</sup> In July, Kenya opened a new high-security courtroom near Mombasa with funds donated by the European Union and several countries, and channeled through UNODC.<sup>171</sup> EU-NAVFOR alone has turned over 75 suspects to the Kenyan authorities since its deployment.<sup>172</sup> In September 2010, Kenya was reported to have convicted fourteen Somali men accused of acts of piracy.<sup>173</sup>

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166. U.N. News Serv., UN Trust Fund Backs Projects in Fight Against Piracy Off Somali Coast (Apr. 23, 2010), [www.un.org/apps/news/printnewsAr.asp?nid=34472](http://www.un.org/apps/news/printnewsAr.asp?nid=34472).

167. These are Kenya, Seychelles, Somalia (in the Somaliland and Puntland regions), Maldives, Yemen, the Netherlands, United States, France, Spain, and Germany. *SG's Report*, *supra* note 1, pt. IV(A), ¶ 19.

168. James Thuo Gathii, *Kenya's Piracy Prosecutions*, 104 AM. J. INT'L L. 416, 416-17 (2010).

169. Hillary Stemple, *UN Announces Opening of New Kenya Courtroom for Piracy Trials*, JURIST (June 25, 2010), [available at http://jurist.org/paperchase/2010/06/un-announces-opening-of-new-kenya-courtroom-for-piracy-trials.php](http://jurist.org/paperchase/2010/06/un-announces-opening-of-new-kenya-courtroom-for-piracy-trials.php).

170. Hillary Stemple, *UN Announces \$9.3 Million in Donations to Fund Piracy Courts*, JURIST (June 15, 2010), [available at http://jurist.org/paperchase/2010/06/un-announces-93-million-in-donations-to-fund-piracy-courts.php](http://jurist.org/paperchase/2010/06/un-announces-93-million-in-donations-to-fund-piracy-courts.php).

171. Mike Pflanz, *At Last, a Court to Try Somali Pirates*, CHRISTIAN SCI. MONITOR, July 8, 2010, [available at http://www.csmonitor.com/World/Africa/2010/0708/At-last-a-court-to-try-Somali-pirates](http://www.csmonitor.com/World/Africa/2010/0708/At-last-a-court-to-try-Somali-pirates).

172. EU NAVFOR Press Release, *supra* note 145.

173. Zach Zaggar, *Kenya Court Convicts 7 More Somali Pirates*, JURIST (Sept. 24, 2010, 1:53 PM), [available at http://jurist.org/paperchase/2010/09/kenya-court-convicts-7-more-somali-pirates.php](http://jurist.org/paperchase/2010/09/kenya-court-convicts-7-more-somali-pirates.php); *see also* EU NAVFOR Press Release, *supra* note 145 (discussing the first seven convictions).

Seychelles was the second state in the region to set up a UN-backed regional center for prosecution of suspected pirates.<sup>174</sup> In the course of the Security Council meeting on August 25, 2010, the country's delegate informed the Council that Seychelles' Supreme Court had sentenced 11 Somali pirates to ten years in prison each and another 29 suspects were awaiting trial.<sup>175</sup>

The first European trial of Somali pirates for hijacking a cargo ship registered in the Netherlands Antilles commenced in the Netherlands District Court of Rotterdam on May 25, 2010.<sup>176</sup> They were convicted and sentenced to five years each, while another Dutch court approved the extradition of ten other Somali piracy suspects to Hamburg, Germany.<sup>177</sup>

#### b. United States

In 2007 President George W. Bush signed the US policy on piracy and armed robbery at sea, which was developed after years of deliberation.<sup>178</sup> It provides for taking unilateral and cooperative action to prevent, interrupt, and terminate pirate acts; facilitate the prosecution of suspected pirates; "preserve the freedom of the seas;" and "protect sea lines of communication," among others.<sup>179</sup> It also provides for the implementation of this policy through an inter-agency process.<sup>180</sup>

Subsequently, in December 2008, the US National Security Council released an action plan implementing the policy.<sup>181</sup> The plan seeks to involve all nations, international organizations, and industry, among others that are interested to take steps to repress piracy in that region.<sup>182</sup> It focuses on operational measures for prevention, disruption, and punishment of acts of Somali pirate organizations.<sup>183</sup> As part of the Maritime Administration Action Plan on addressing this problem, pertinent information and advice to counter piracy and armed robbery is provided to assist ship owners, operators, and the maritime industry in preventing ship hijackings.<sup>184</sup>

174. U.N. News Serv., *Seychelles to Launch UN-Backed Courts to Combat Piracy* (May 5, 2010), <http://www.un.org/apps/news/story.asp?NewsID=34601&Cr=piracy&Cr1=&Kw1=pirate&Kw2=&Kw3=#>.

175. U.N. Dep't of Pub. Info., *supra* note 77, para. 96.

176. Sarah Miley, *Dutch Court Begins Europe's First Somali Pirate Trial*, JURIST (May 25, 2010, 10:30 AM), available at <http://jurist.org/paperchase/2010/05/dutch-court-begins-europes-first-somali-pirate-trial.php>.

177. Spencer Swartz, *World News: Somali Pirates Sentenced for Ship Attack*, WALL ST. J., June 18, 2010, at A11.

178. See Memorandum from President George W. Bush on Mar. Sec. (Piracy) Policy to the Vice President (June 14, 2007), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/06/20070614-3.html>.

179. *Id.* pt. III.

180. *Id.* pt. IV.

181. U.S. NAT'L SEC. COUNCIL, COUNTERING PIRACY OFF THE HORN OF AFRICA: PARTNERSHIP & ACTION PLAN 3, (2008), available at [http://www.marad.dot.gov/documents/Countering\\_Piracy\\_Off\\_The\\_Horn\\_of\\_Africa\\_-\\_Partnership\\_Action\\_Plan.pdf](http://www.marad.dot.gov/documents/Countering_Piracy_Off_The_Horn_of_Africa_-_Partnership_Action_Plan.pdf).

182. *Id.*

183. *Id.* at 3-4.

184. *Horn of Africa Piracy*, U.S. DEP'T OF TRANSP., MAR. ADMIN, [www.marad.dot.gov/news\\_room\\_landing\\_page/horn\\_of\\_africa\\_piracy/horn\\_of\\_africa\\_piracy.htm](http://www.marad.dot.gov/news_room_landing_page/horn_of_africa_piracy/horn_of_africa_piracy.htm).

The United States Constitution in Article 1 grants Congress the power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”<sup>185</sup> In a decision on August 17, 2010, *United States v. Said*, a federal district court construed the statute defining piracy, which was originally enacted in 1819.<sup>186</sup> The statute reads: “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”<sup>187</sup> The court also noted other related federal statutes on Attack to Plunder a Vessel,<sup>188</sup> Acts of Violence Against Persons on a Vessel,<sup>189</sup> Conspiracy to Perform Acts of Violence Against Persons on a Vessel,<sup>190</sup> Assault with a Dangerous Weapon on Federal Officers and Employees,<sup>191</sup> Conspiracy Involving Firearm and a Crime of Violence,<sup>192</sup> and Use of Firearm During a Crime of Violence.<sup>193</sup>

The court dismissed the piracy count of a five-count indictment against defendant Said and his co-defendants, all of whom were passengers aboard a skiff from which shots were fired on the USS Ashland in the Gulf of Aden in April 2010.<sup>194</sup> The defendants had asked for such dismissal because they did not board nor did they take control of the US ship or take anything from it.<sup>195</sup> In response, the government’s argument was that the motion should be denied because historically piracy is not limited to the common law definition of robbery on land and has included conduct beyond robbery.<sup>196</sup> Specifically, the prosecution’s assertion was that, as defined by the “law of nations,” any unauthorized violent act or attack committed on the high seas against another ship suffices to constitute piracy, which does not require the actual taking of property.<sup>197</sup>

The court began its analysis by noting that the language of the piracy statute did not provide any guidance on the scope of piracy under the law of nations, and thus it must examine the pertinent case law.<sup>198</sup> It relied upon an 1820 case decided by the US Supreme Court, *United States v. Smith*,<sup>199</sup> “the only case to ever directly examine the definition of piracy under § 1651”<sup>200</sup> as the governing authority, and

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185. U.S. CONST. art. I, § 8, cl. 10.

186. *United States v. Said*, No. CRI.A.2:10cr57, 2010 WL 3893761, at \*2-3 (E.D. Va. Aug. 17, 2010).

187. 18 U.S.C. § 1651 (2010).

188. 18 U.S.C. § 1659 (2010).

189. 18 U.S.C. § 2291(a)(6) (2010).

190. 18 U.S.C. § 2291(a)(9) (2010).

191. 18 U.S.C. § 111(a)-(b) (210).

192. 18 U.S.C. § 924(o) (2010).

193. *Id.* § 924(c)(1)(A)(iii).

194. *United States v. Said*, No. CRI.A.2:10cr57, 2010 WL 3893761, at \*2-3 (E.D. Va. Aug. 17, 2010).

195. *Id.* at \*1.

196. *Id.*

197. *Id.*

198. *Id.* at \*4.

199. *Id.*; *United States v. Smith*, 18 U.S. 153 (1820).

200. *United States v. Said*, No. CRI.A.2:10cr57, 2010 WL 3893761, at \*4 (E.D. Va. Aug. 17, 2010).

stated that since the defendants “did not board, take control or otherwise rob the USS Ashland,” they did not commit the offense of “piracy” as defined by the Supreme Court in *Smith*.<sup>201</sup>

The Court observed that, as with every criminal statute, piracy under the law of nations is subject to constitutional due process, requiring fair warning before the statute is enforced against the defendant.<sup>202</sup> Thus, enforcement of a “statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application” is barred.<sup>203</sup> It also referred to the canon of strict construction of criminal statutes.<sup>204</sup>

The court noted that the law of nations means “customary international law,” and defined the term as it is normally defined, to wit: international law principles that “countries must universally abide by . . . out of a sense of legal obligation and mutual concern.”<sup>205</sup>

In *Smith*,<sup>206</sup> the US Supreme Court had concluded that writers on the common law, the maritime law, and the law of nations “universally treat piracy as an offense against the law of nations, and that its true definition by that law is robbery upon the sea.”<sup>207</sup> The *Said* court found that this definition had been reiterated and followed without exception—it had “reached a level of concrete consensus in United States law since its pronouncement in 1820.”<sup>208</sup>

As mentioned above, the defendants in *Said* thus argued that the statute could not be read to include the charged conduct.<sup>209</sup> Their rationale was that, although the statute did not define “piracy,” the term, derived from “the law of nations,” did not encompass a shooting without a concomitant robbery at sea.<sup>210</sup> On the other hand, the government’s position was that, even if “piracy” was defined in *Smith* and subsequent cases as “robbery or forcible depredation,” the term included many crimes beyond robbery, including defendants’ alleged attack on the US vessel with an AK-47 rifle.<sup>211</sup>

The court rejected the government’s argument, stating that “depredation” itself is defined as “the act of plundering; pillaging, . . . [or] the act of plundering; a robbing; a pillaging.”<sup>212</sup> Thus, the court stated:

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201. *Id.* at \*3-4, \*11.

202. *Id.* at \*4.

203. *Id.* at \*2 (citing *United States v. Lanier*, 520 U.S. 259, 266 (1997)).

204. *Id.* at \*3.

205. *Id.* at \*2 (citing *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 144 (2d Cir. 2003)).

206. *United States v. Smith*, 18 U.S. 153 (1820).

207. *Smith*, 18 U.S. at 161, *quoted in* *United States v. Said*, No. CRI.A.2:10cr57, 2010 WL 3893761, at \*4 (E.D. Va. Aug. 17, 2010).

208. *Said*, 2010 WL 3893761, at \*4.

209. *Id.* at \*3.

210. *Id.* at \*7-8.

211. *Id.* at \*6.

212. *Id.* at \*6 (citations omitted).



This definition does not include acts of assault or aggression, and Justice Story's use of the terms "robbery" and "forcible depredations" [in *Smith*] does not embrace the conduct charged against Defendants. Accordingly, the Government's argument is both an expansion and a misinterpretation of *Smith* and it would be erroneous for the Court to agree with it.

In sum, the Government simply fails to cite to one case in United States jurisprudence in which the Defendant was criminally prosecuted for "piracy in violation of the law of nations," for conduct that fell short of robbery or seizure of a ship. Finding none, this Court concludes that the Supreme Court in *Smith* set forth the authoritative definition of piracy as robbery or forcible depredations on the high seas, *i.e.*, sea robbery.<sup>213</sup>

The court did not find the cases cited by the government to support the expanded scope of the definition of piracy persuasive.<sup>214</sup> It also reviewed the statutory history of Section 1651 and found that subsequent Congressional actions since the enactment of the statute have continued to support the *Smith* definition of piracy.<sup>215</sup>

Next, the court reviewed the traditional sources as evidence of customary international law: conventions, case law, and the writings of publicists or scholars, and concluded that contemporary international law sources are not consistent on the definition of piracy.<sup>216</sup> The court did refer to the 1958 Convention on the High Seas<sup>217</sup> and the 1982 United Nations Convention on the Law of the Sea,<sup>218</sup> and the British Privy Council case *In re Piracy Jure Gentium*,<sup>219</sup> all of which would have included the conduct charged against these defendants in *Said* as piracy, but also noted that there is no consensus among scholars on the matter.<sup>220</sup>

Finally, the court determined that constitutional due process constraints prevented it from construing the piracy statute to extend the *Smith* definition of piracy because "[t]he *Smith* Court held that [Section] 1651 was not unconstitutionally vague because piracy under the law of nations had a specified meaning: robbery at sea."<sup>221</sup> In the *Said* court's words,

Given the flexible manner in which international sources treat the definition of piracy, and that these sources inherently conflict with Supreme Court precedent, the Court's reliance on these international sources as authoritative would not meet constitutional muster [of due

213. *United States v. Said*, No. CRIA.2:10cr57, 2010 WL 3893761, at \*6 (E.D. Va. Aug. 17, 2010).

214. *Id.* at \*5.

215. *Id.* at \*6-7.

216. *Id.* at \*8-10.

217. *Id.* at \*8; *see also* Convention on the High Seas, *supra* note 24, art. 15.

218. *Id.* at \*8; *see also* UNCLOS, *supra* note 23, art. 101.

219. *Said*, 2010 WL 3893761, at \*8 (citing *In re Piracy Jure Gentium*, [1934] A.C. 586 (P.C.)).

220. *Id.* at \*8-9.

221. *Id.* at \*10 (citing *United States v. Smith*, 18 U.S. 153, 162 (1820)).

process] and must therefore be rejected. The *Smith* definition of piracy as sea robbery, on the other hand, is clear and authoritative.<sup>222</sup>

In its sole reliance on *Smith*—concluding that since there is no robbery there is no piracy, despite the defendants' *attempt* at piracy—the *Said* court misses the point. Not to extend the definition of piracy beyond that in *Smith* seems unwarranted, especially in view of the 1958 Convention on the High Seas and the 1982 UNCLOS, both of which are widely accepted as codifications of the customary international law. However, even if there might be some doubt whether the conventions had indeed been codified customary international law, as a party to the 1958 Convention the United States is bound to comply by enforcing its terms in US courts. In any event, it seems appropriate to quote the British Privy Council in its 1934 decision, *In re Piracy Jure Gentium*:

When it is sought to be contended . . . that armed men sailing the seas on board a vessel, without any commission from any State, could attack and kill everybody on board another vessel, sailing under a national flag, without committing the crime of piracy unless they stole, say, an article worth sixpence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law.<sup>223</sup>

Ten days after the decision in *Said* was announced, the Somali suspect, Jama Idle Ibrahim, pleaded guilty to several charges of attacking to plunder a vessel, committing an act of violence against persons on a vessel, and the use of a firearm in the commission of a crime of violence.<sup>224</sup> Under the plea agreement he will receive a thirty-year sentence and the sentencing hearing will be on November 29, 2010.<sup>225</sup> Earlier, in May 2010, a Somali man pled guilty to charges of hijacking the container ship *Maersk Alabama*, kidnapping its captain, hostage taking, and conspiracy.<sup>226</sup>

#### IV. APPRAISAL

The United Nations and its specialized agencies, regional organizations, coalitions of states, as well as several states independently, have in the last few years taken numerous robust measures to repress piracy. However, notwithstanding these actions piracy persists as a major threat to maritime navigation, especially with continuous attacks off the Coast of West Africa and in the Far East.

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222. *Id.* at \*11.

223. *In re Piracy Jure Gentium*, [1934] A.C. 586 (P.C.) 594.

224. Warren Richey, *Somali Pleads Guilty in Case of Pirate Attack on US Warship*, CHRISTIAN SCI. MONITOR, Aug. 27, 2010, available at <http://www.csmonitor.com/USA/Justice/2010/0827/Somali-pleads-guilty-in-case-of-pirate-attack-on-US-warship>.

225. *Id.*

226. Ray Rivera, *Somali Man Pleads Guilty in 2009 Hijacking of Ship*, N.Y. TIMES, May 19, 2010, at A21, available at <http://www.nytimes.com/2010/05/19/nyregion/19pirate.html>.

To illustrate, the IMO reported 46 acts of piracy and armed robbery against ships in August 2010.<sup>227</sup> On September 23, 2010, the Associated Press reported pirates' failed attempt to take over an offshore oil platform in the Gulf of Guinea, along Nigeria's coast.<sup>228</sup> While clashing with the Nigerian army and retreating, the pirates kidnapped three French employees of a marine services company.<sup>229</sup> On the same day, the BBC reported that the IMO received a petition signed by more than 930,000 seafarers, calling for immediate global action to halt piracy.<sup>230</sup> The signatories urged governments to take immediate steps to secure the release of kidnapped sailors, numbering 354 taken by Somali pirates alone.<sup>231</sup> They also called for "significant resources and concerted efforts to find real solutions to the growing piracy problem."<sup>232</sup>

The situation has worsened for many reasons, including the geographical expansion by pirates of their operations to hundreds of miles from the coast. The vast distances involved, requiring millions of square miles to be covered by naval forces, adds to the difficulties of preventing and deterring piracy.<sup>233</sup>

In addition, pirates have begun investing their ransom money in heavy weapons and land-based militias, and both the Somali government officials and al-Shabaab leaders of the militant Islamicist insurgency are reportedly wooing the pirates.<sup>234</sup> Thus far, al-Shabaab has been funding its operations by taxing businesses in the territory it controls, along with contributions from its supporters abroad.<sup>235</sup> Its leaders are now reportedly using the pirates to raise money, which adds further complications.<sup>236</sup> Finally, restoration of law and order in Somalia remains illusory, as the security situation seems to be worsening. Hence, the long-term solution to the piracy problem that has to be political is nowhere in sight.

227. IMO, *Reports on Acts of Piracy and Armed Robbery Against Ships -- Acts reported during August 2010*, MSC.4/Circ.159 (September 1, 2010); see also IMO, CURRENT AWARENESS BULLETIN (July 2010), available at <http://www.imo.org/KnowledgeCentre/CurrentAwarenessBulletin/Documents/CAB%20165%20July%202010.pdf> (monthly bulletin giving maritime news, including news from the IMO and the United Nations, and maritime news in the press); *Piracy and Security*, LLOYD'S LIST, [www.lloydslist.com/ll/sector/piracy-and-security](http://www.lloydslist.com/ll/sector/piracy-and-security) (daily news and analysis for the global maritime industry).

228. Greg Keller, *3 French Employees Kidnapped from Ship off Nigeria*, ASSOCIATED PRESS, Sept. 23, 2010, available at <http://www.wfaa.com/news/world/103524974.html>.

229. *Pirates Attack Oil Platform, Kidnap French Workers*, WALL ST. J., Sept. 23, 2010, at A18, available at <http://online.wsj.com/article/SB20001424052748703860104575508263862382210.html>.

230. *Sailors Call for Urgent Global Action to Halt Piracy*, BBC NEWS, Sept. 23, 2010, available at <http://www.bbc.co.uk/news/world-11400354>.

231. *Id.*

232. *Id.*

233. *Id.*

234. Jeffrey Gettleman, *In Somali Civil War, Both Sides Embrace Pirates*, N.Y. TIMES, Sept. 2, 2010, at A1, available at <http://www.nytimes.com/2010/09/02/world/africa/02pirates.html>.

235. Sarah Childress, *Somali Militants Try Piracy to Fund Attacks*, WALL ST. J., Sept. 11, 2010, at A9, available at <http://online.wsj.com/article/SB10001424052748703720004575477491009472882.html>.

236. *Id.*

If, for various reasons, prevention and deterrence of piratical attacks cannot be ensured, effective mechanisms for apprehending and prosecuting alleged pirates, their detention and imprisonment, and extradition where appropriate, must be in place to serve two purposes: 1) as deterrence, and 2) to hold the perpetrators accountable.<sup>237</sup> It is worth recalling that the UN Security Council, in a preambular paragraph to Resolution 1851, noted that “the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture, has hindered more robust international action against the pirates off the coast of Somalia and in some cases led to pirates being released without facing justice....”<sup>238</sup>

In reality, the needed mechanisms, logistics, and facilities to ensure apprehension and prosecution, detention, extradition, and imprisonment are barely in place. First, many countries, including the United States, have yet to update their criminal laws to provide such authorization.<sup>239</sup> Second, several countries are hesitant to bring captured suspects to their courts not only because of the logistical problems—travel, evidence, witnesses, delay, and cost, among others—but also considerations of the need to comply with strict human rights norms and the risk that the suspect might seek asylum. Hence, freed after capture, suspects often await the next venture, hoping for success.<sup>240</sup>

## V. RECOMMENDATIONS

An effective solution to the menace of piracy off the coast of Somalia has to be comprehensive, focusing on peace and stability in that country. How to bring that about and what political means and political will are needed to accomplish that objective are beyond the scope of this paper. Instead, the focus here has been on international and regional cooperative measures to prevent and deter acts of piracy and to bring pirates to justice. The critical elements remain (1) to find appropriate means and authority to apprehend, detain, and prosecute suspected pirates and, (2) to make sufficient arrangements for imprisoning them in the region, or to extradite the suspects. In this respect, the efforts undertaken by the United Nations and several international organizations are noteworthy. Also, although some states have taken the necessary steps, the creation of an effective legal framework depends upon uniform state practice in this regard.

The laudable role of the United Nations and its specialized agencies and regional organizations in providing assistance to Kenya and Seychelles to ensure

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237. James Kraska & Brian Wilson, *The Pirates of the Gulf of Aden: The Coalition is the Strategy*, 45 STAN. J. INT'L L. 243, 254-57 (2009).

238. S.C. Res. 1851, *supra* note 52, *pmbl.*

239. See James Kraska & Brian Wilson, *International Coordination is the Key to Countering Modern-Day Freebooters*, ARMED FORCES J., available at <http://www.armedforcesjournal.com/2009/02/3928962>; see also *Said*, 2010 WL 3893761, at \*6.

240. See *Piracy Laws Under Review in Nation*, MOWCA, available at [www.mowca.org/new%20design/news/news0135.html](http://www.mowca.org/new%20design/news/news0135.html) (last visited September 26, 2010) (“The biggest challenge we are facing in dealing with piracy in the East African Coast is lack of proper laws that allow us to prosecute them in our own countries . . .”). Thirteen pirates arrested in Tanzanian waters were set free because of the lack of legal grounds in Tanzania to prosecute them. Kraska & Wilson, *supra* note 237.

prosecution and imprisonment of those suspected of piracy needs to be enhanced. Consequently, burden sharing becomes an important item on the international agenda.

States that have not yet criminalized acts of piracy in their domestic legislation or provided the necessary authorization under the pertinent international conventions and customary international law to prosecute and punish suspected pirates must do so as a matter of priority. States are also under a treaty obligation to cooperate in the repression of piracy, under UNCLOS article 100: "All States shall cooperate to the fullest extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."<sup>241</sup>

Granted, these efforts cannot suffice for a comprehensive long-term solution. In the short-term, however, they can provide the necessary deterrence to limit the toll taken by international commerce and navigation in the last decade. As the representative from Norway said in the discussion at the Security Council, on August 25, 2010, "It is simply unacceptable that the suspects are released when there is sufficient evidence against them, as this undermines the credibility and effectiveness of the naval presence."<sup>242</sup>

Many European countries have been doing just that, the "catch-and-release" approach. For instance, the European Union's naval forces released 235 of the 275 pirates they captured in March and April 2010, according to a Swedish navy commander and spokesman for the EU forces.<sup>243</sup> Similarly, several countries including Russia, Portugal, Canada, and the Netherlands have routinely released captured pirates.<sup>244</sup> Bringing pirates to justice is essential for its deterrent effect. Prosecutions must be done in compliance with widely recognized principles of due process and applicable international human rights norms.

Ideally Somalia should try and imprison its own nationals, but since it does not have the judicial capacity for this task, alternative means have to be found. Thus, detention, prosecution, and imprisonment have to take place in the region where the piracy was committed because of cultural, familial, and linguistic considerations and the proximity to where the acts took place, so that the patrolling naval states can transfer them there. It seems appropriate that perhaps a special chamber in one of the states in that region could specifically deal with this issue. For this to happen extensive personnel and financial support from other countries and organizations would be required.

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241. UNCLOS, *supra* note 23, art. 100.

242. U.N. Dep't of Pub. Info, *supra* note 77, para. 85.

243. Craig Whitlock, *Lack of Prosecution Poses Challenge for Foreign Navies that Capture Pirates*, WASH. POST, May 24, 2010, at A8, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/23/AR2010052303893.html>.

244. Anne Applebaum, *Somali Pirate's Clash with Russian Navy Reveals a Gap in Rule of Law*, WASH. POST, May 18, 2010, at A19; Ellen Barry, *Russia Frees Somali Pirates it had Seized in Shootout*, N.Y. TIMES, May 8, 2010, at A4; *Piracy: Wrong Signals, Pirates and Legal Knots*, THE ECONOMIST, May 9, 2009; Craig Whitlock, *supra* note 243.

Should the payment of ransom to pirates, which is the usual practice in seeking freedom for hostages or the release of hostage ships and cargo, be prohibited? The delegate from South Africa suggested this move at the Security Council meeting of July 26, 2010.<sup>245</sup> However, currently there does not seem to be wide support for this approach.

At the same Security Council meeting, Ukraine said that it intended to submit for the General Assembly's consideration a draft comprehensive convention on combating piracy and armed robbery at sea.<sup>246</sup> The prospects for such a comprehensive convention do not appear to be promising at this stage. Currently, the existing legal framework presents the best prospects. States must cooperate fully with one another and with international and regional organizations to ensure its effective implementation.

#### POSTSCRIPT

Incidents of piracy and armed robbery in 2010 reached 445, compared with 400 in 2009, as reported by the Piracy Reporting Center of the International Maritime Bureau, an agency which receives reports of pirate attacks twenty-four hours a day from around the globe and has monitored piracy worldwide since 1991. These numbers have risen every year since 2006.<sup>247</sup> Pirates captured 1,181 seafarers in 2010, compared with 1,050 in 2009, while 188 crewmembers were taken hostage in 2006.<sup>248</sup> Ninety-two percent of all ships seized in 2010 were hijacked off the coast of Somalia. Captain Pottengal Mukundan, Director of the IMB's Piracy Reporting Center, said that the numbers for hostages and vessels taken were the highest "we have ever seen." Furthermore, "[t]he continued increase in these numbers is alarming."<sup>249</sup>

While the number of incidents rose in Bangladesh, Indonesia, and the South China Seas, and violent attacks continued around Nigeria, one bright spot, according to the report, was the Gulf of Aden. In the Gulf of Aden the number of incidents halved in 2010, with fifty-three attacks compared with 117 in 2009. The IMB attributes the decline "to the deterrence work of naval forces from around the world that have been patrolling the area since 2008 and to the ships' application of self-protection measures recommended in Best Management Practices, version 3 . . . , a booklet published last year by the shipping industry and navies."<sup>250</sup>

Other developments included conviction of five Somali pirates on federal piracy charges in the Virginia Federal District Court, the first piracy conviction in

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245. U.N. Dep't of Pub. Info, *supra* note 77, paras. 83-84.

246. *Id.* para. 88

247. Press Release, Commercial Crime Serv. of Int'l Chamber of Commerce, Hostage-Taking at Sea Rises to Record Levels, Says IMB (Jan. 17, 2011) *available at* <http://www.icc-ccs.org/news/429-hostage-taking-at-sea-rises-to-record-levels-says-imb>. For figures for 2006-2009, see *supra* notes 11-15.

248. *Id.*

249. *Id.*

250. *Id.*

the United States since 1819.<sup>251</sup> On January 21, 2011, the South Korean Navy rescued a tanker that had been hijacked by Somali pirates, killing eight of the pirates, capturing five, and rescuing all twenty-one hostages. IMB Director Mukundan commented: "The IMB commends the robust actions of the South Korean navy and renews its call for greater naval action in the fight against this brand of maritime crime."<sup>252</sup> It should be noted that during the first three weeks of January, the IMB Piracy Reporting Center had already reported thirty-nine incidents, thirty-one of which are attributed to Somali pirates.<sup>253</sup>

In December 2010, the One Earth Future Foundation released a report entitled "The Economic Costs of Maritime Piracy"<sup>254</sup>, analyzing the cost in three regions: 1) the Horn of Africa; 2) Nigeria and the Gulf of Guinea; and 3) the Malacca Straits. It concludes that the global cost of piracy "is at least \$7 to \$12 billion per year," which, according to the report, is using "conservative estimates, so as to not overinflate the costs."<sup>255</sup> The report found that the ransoms paid to Somali pirates have increased from an average of \$150,000 in 2005 to \$5.4 million in 2010.<sup>256</sup> A South Korean oil tanker, the *Samho Dream*, paid the highest ransom on record, \$9.5 million to Somali pirates in November 2010; approximately \$238 million was paid in ransoms to Somali pirates in 2010 alone.<sup>257</sup> Pirates held ships for an average of 106 days between April and June 2010, up from fifty-five days in 2009 and the last four ships released in November 2010 were held for an average of 150 days.<sup>258</sup>

The judiciary in Kenya has tried pirates captured outside of Kenyan territorial waters because of a series of agreements with the United States, the European Union, and other countries. However, in November 2010 a senior Kenyan judge said that the courts in Kenya have to power to prosecute crimes that took place outside Kenya's territorial waters.<sup>259</sup>

Because most countries capturing pirates usually set them free after a period of time, with a few exceptions, such as the trial in Virginia, there seems to be a need for an effective punishment and deterrent system. One obvious possibility

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251. Assoc. Press, *5 Somalis are Found Guilty of Attacking U.S. Warship*, N.Y. TIMES, Nov. 25, 2010, at A26; Warren Richey, *Five Somali Pirates Convicted of Attacking US Navy Ship*, CHRISTIAN SCI. MONITOR, Nov. 24, 2010, <http://www.csmonitor.com/USA/Justice/2010/1124/Five-Somali-pirates-convicted-of-attacking-US-Navy-ship>.

252. Press Release, Commercial Crime Serv. of Int'l Chamber of Commerce, South Korean Navy Rescues Hijacked Ship (Jan. 21, 2011) <http://www.icc-ccs.org/news/430-southkoreannavyrescues-hijackedship>.

253. *Id.*

254. Anna Bowden, *The Economic Costs of Maritime Piracy* (One Earth Future Foundation Working Paper, Dec. 2010)

255. *Id.* at 25.

256. *Id.* at 9.

257. *Id.* at 9-10.

258. *Id.*

259. Mike Pflanz, *Landmark Kenya Ruling Could See Dozens of Somali Pirates Set Free*, CHRISTIAN SCI. MONITOR, Nov. 10, 2010, <http://www.csmonitor.com/World/Africa/2010/1110/Landmark-Kenya-ruling-could-see-dozens-of-Somali-pirates-set-free>.

that should be explored is a tribunal to try pirates, under an international framework. The Security Council's Chapter VII may provide the United Nations the authority to establish such a international tribunal. The challenges of establishing such an international judicial body are enormous, but seriously considering this possibility remains worthwhile.<sup>260</sup>

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260. See, e.g. David B. Rivkin, Jr. & Carlos Ramos-Mrosovsky, *A Better Way to Deal With Pirates*, WASH. POST, Dec. 9, 2010, at A27 available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/08/AR2010120806188.html> (suggesting that the Security Council create such a tribunal and that the United states pay a leading role).



