Trading the Shield of Sovereignty for the Scales of Justice: A Proposal for Reform of International Sea Piracy Laws

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TRADING THE SHIELD OF SOVEREIGNTY FOR THE SCALES OF JUSTICE:
A PROPOSAL FOR REFORM OF INTERNATIONAL SEA PIRACY LAWS

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ABSTRACT

Contemporary piracy represents a large and complex threat to international security. The crime has evolved to the extent that it no longer conforms to its antiquated definition, and the rationales that underlie the ‘high seas’, ‘private ends’ and ‘two ships’ requirements of the crime articulated within UNCLOS 1982 have no relevance in the new millennium. Piracy should be redefined to include the kinds of maritime crimes that are commonly perpetrated on the seas, and a very broad notion of universal jurisdiction should attach to the crime, such that any state would be permitted to enter the territorial sea of another state for the purpose of apprehending and prosecuting pirates.
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SUMMARY

I. INTRODUCTION........................................................................................................................................3

II. DEFINITION AND HISTORY OF PIRACY..................................................................................................4
   1. The ‘PRIVATE ENDS’ REQUIREMENT .........................................................................................................5
   2. The ‘HIGH SEAS’ REQUIREMENT ...............................................................................................................7
   3. The ‘TWO SHIPS’ REQUIREMENT .............................................................................................................8

III. CONTEMPORARY PIRATES: EXPLOITING DEFICIENCIES IN EXISTING INTERNATIONAL LAW ..........9
   A. The Achille Lauro Incident ..................................................................................................................9
   1) The Vietnamese Boat People: Pirates Preying on Refugees .................................................................10
   2) Pirates in the New Millennium: The Somalia Problem ......................................................................11
   3) A Suggestion for a New Definition of Piracy ......................................................................................13

IV. THE CONTENTIOUS MATTER OF UNIVERSAL JURISDICTION OVER PIRACY .........................14
   A. Narrow / Conditional Universal Jurisdiction .......................................................................................16
   B. Broad / Absolute Universal Jurisdiction ..............................................................................................17
   C. Extreme Universal Jurisdiction ............................................................................................................17

V. POTENTIAL MECHANISMS FOR EFFECTING CHANGES TO THE LAW OF PIRACY ..............20

VI. CONCLUSION ........................................................................................................................................22
I. INTRODUCTION

In the year 75 B.C., pirates captured young Julius Caesar and held the future Roman leader for ransom.\(^1\) On November 15, 2008, pirates hijacked the oil tanker MV Sirius Star approximately 450 nautical miles (NM) from the coast of Kenya, and did not release the vessel until January 8, 2009, when a ransom of some $3 million (USD) was reportedly paid on behalf of the vessel’s owner.\(^2\) As these two incidents demonstrate, the problem of piracy is one that spans several millennia; in fact, the phenomenon of piracy has plagued sailors ever since man first started navigating the seas.\(^3\) Similarly, prohibitions against piracy have formed part of the law of nations ‘for as long as sovereignty-based jurisdictional principles have existed’\(^4\).

Unfortunately, however, the body of international law relating to piracy has remained virtually unchanged over the last two centuries, while the crime itself has evolved dramatically. Conventional international law of the sea, as expressed within United Nations Convention on the Law of the Sea\(^5\) (which is itself largely a codification of customary law of the sea), seems tailored to combat forms of piracy that predominated during the age of sail, when pirates tended to operate in international waters, using their own ships\(^6\) to attack merchant ships in order to accumulate wealth for private purposes.\(^7\) Contemporary pirates, however, operate in regional ‘clusters’ wherever the rule of law is weakest – often within the territorial seas of failing, failed, or apathetic states;\(^8\) they seek to gain control of target vessels by any means, including hijacking;\(^9\) and they are often driven by complex motives that are both political and private.\(^10\) In other words, the legal characterization of piracy at international law no longer conforms to the reality of the crimes that are actually being perpetrated on the water today.

The disconnect that now exists between the theoretical definition of piracy at international law and the contemporary reality of the crime as manifested in a majority of recent acts of violence and robbery at sea is troubling for more than merely semantic reasons. Piracy is one of a very limited number of international crimes to which universal jurisdiction attaches; in fact, piracy is

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\(^3\) Goodwin (n 1) 977.


\(^7\) Halberstam (n 6).


\(^9\) Halberstam (n 6) 284, 287.

\(^10\) Ibid, 282; see also Douglas Guilfoyle, ‘Piracy Off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts’ (2008) 57 INT’L COMP LQ 690, 692, where the author describes how contemporary Somali pirates often claim to be acting in order to deter illegal fishing and dumping within Somali territorial waters and Exclusive Economic Zone (EEZ).
the original ‘universal jurisdiction’ crime.11 The major benefit of allowing any state to apprehend and prosecute pirates is readily apparent: some form of naval presence is required in order to catch pirates at sea, but many states that would otherwise have jurisdiction over an act of piracy (according to more common ‘territoriality’, ‘nationality’, or ‘passive personality’ bases of jurisdiction)12 might not have naval forces capable of apprehending the offending pirates. Thus, international law logically permits any state to exercise jurisdiction over the crime, presumably to increase the likelihood that it will be properly punished. However, because the doctrine of universal jurisdiction is applied so restrictively at international law, any inconsistencies between the legal definition and the actual phenomenon of piracy will serve to remove most acts of maritime violence from the domain of universal jurisdiction crimes. In other words, the disparity that currently exists between the legal definition of piracy and the reality of ‘piratical’13 acts at sea operates to unnecessarily deny capable states of the jurisdiction that they require to apprehend and prosecute pirates.

In order to prevent international law of the sea from becoming an obstacle to global anti-piracy efforts, I believe that the legal definition of piracy must be expanded to include virtually all acts of maritime robbery and violence, on the high seas and in territorial waters, and all states must remain capable of asserting universal jurisdiction over such acts. In developing my argument in this respect, I will first define and summarize the history of piracy (in Part II of this paper), demonstrating in detail what the crime was and what it has become. In Part III, I will demonstrate the flaws in the existing UNCLOS definition of piracy by referring to several high-profile acts of maritime violence that have taken place over the last thirty years and to the current piracy endemic off the coast of Somalia, in an attempt to formulate a more appropriate definition of the crime at international law. Next, in Part IV, I will suggest why universal jurisdiction must continue to attach to the crime of piracy, and will discuss possible grounds of objection to the idea of expanding universal jurisdiction over crimes at sea. Finally, in Part V, I will posit some of the possible means by which the definition of piracy could be modified to effect the changes that I advocate in this paper. Ultimately, I hope to show that efforts to combat piracy would be greatly facilitated by an amendment to the definition of the crime that results in an extension of universal jurisdiction to a more broad range of piratical acts.

II. Definition and History of Piracy

In order to frame the ensuing discussion, it is now appropriate to consider the legal definition of piracy, as expressed within UNCLOS. Article 101 of the convention states that ‘piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
   (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
   (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of

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11 Halberstam (n 6) 272.
13 Throughout this paper, I will use the term ‘piratical’ to describe any serious act of robbery or violence that takes place on the oceans or seas.
any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with
knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph
(a) or (b) (emphasis added)\(^\text{14}\).

For the purposes of this paper, the problematic elements of the definition of piracy are all
contained within subparagraph (a) of Article 101, and are emphasized in bold text, above. Essentially, an act must be committed for private ends, in international waters, and by one vessel
against another in order to be considered piracy at international law. Although this definition is
now arguably obsolete in light of contemporary pirate practices, a brief examination of certain
aspects of the history of the crime will reveal the origins of the definition, and its initial
correspondence with the phenomenon of piracy.

\section{The ‘Private Ends’ Requirement}

Although it might seem unusual to incorporate a test of a perpetrator’s motive\(^\text{15}\) into a definition of a crime, such a measure was originally necessary at international law in order to distinguish piracy from privateering. Privateering was essentially state-sponsored piracy: the privateer was
issued a ‘letter of marque’ from his monarch that authorized him to capture enemy ships on the
high seas. Upon returning home, the privateer would then be forced to prove to a domestic Prize
Court that the captured vessel had been lawfully seized – that is to say, that the conditions set
forth in the letter of marque had been respected. Typically, these restrictions were not onerous
and would simply indicate which nation’s vessels could be targeted, and some criteria relating to
the treatment of captured crew members. If the seizure was deemed lawful, then the vessel
would be sold, and the proceeds would generally be split between the crown (10\%) and the
privateers (90\%).\(^\text{16}\) Thus, a state that sanctioned privateering would enjoy a double benefit from
the enterprise: the crown would derive direct revenue from the sale of captured vessels, and in
wartime it would inflict indirect losses on an enemy state’s merchant shipping through the
actions of unfunded privateers.

As several commentators have observed, and as is evident from the above description of
privateering, the actions of pirates and privateers were identical, and it was only the letter of
marque that legalized the conduct of the latter.\(^\text{17}\) In other words, piracy was acceptable as long as
the respective crown received a portion of the spoils. Furthermore, it is apparent that states had
little cause to complain about privateering, even when their country’s vessels were targeted,

\(^{14}\) UNCLOS (n 5) Article 101.

\(^{15}\) Recall that motive is distinct from \textit{mens rea}. \textit{Mens rea} refers to the mental element of a crime that must
typically be proven in order to secure a criminal conviction, or to an individual’s exercise of free will to use a
particular means to produce a particular result. Motive simply refers to the thought process that precedes and
induces such an exercise of free will – it is the ulterior intention underlying the crime. See \textit{R v Lewis}, [1979] 2 SCR
821 (Can), for a general overview of the distinction between \textit{mens rea} and motive.

\(^{16}\) See Kontorovich (n 4) 210, 214, for a summary of privateering and prize law principles.

\(^{17}\) See Goodwin, (n 1) 981: ‘little separated the pirate from the privateer in tactics.’ See also Antonio Cassese,
\textit{International Criminal Law} (Oxford University Press, New York 2003) 24: ‘conduct amounting to piracy […] was
identical to the conduct amounting to “privateering”’. See also Kontorovich (n 4) 210: ‘privateers engaged in the
exact same conduct as pirates: seizing merchant shipping through the threat of lethal force.’
since the crown would suffer no direct loss if a privately owned merchant vessel were captured. In spite of the prevalence of privateering during the 18th and early-19th centuries, England began to actively combat piracy during the same period,18 if for no other reason than for the failure of pirates ‘to comply with the formalities of licensing’.19 Thus, as a definition of piracy began to emerge at international law, it became important to distinguish between state-sanctioned acts of robbery on the high seas (which were condoned by all states) and unsanctioned acts of robbery. In light of this historical context, it is not surprising that customary international law saw a ‘private ends’ requirement incorporated into the definition of piracy. This element of the crime of piracy was eventually written into the 1932 Harvard Draft Convention on Piracy,20 the 1958 Geneva Convention on the High Seas,21 and UNCLOS,22 and now forms part of the existing definition of piracy at international law.23

While the need to differentiate between criminal acts of piracy and state-sanctioned privateering ventures may have been necessary up until the mid-nineteenth century, it is not clear why the ‘private ends’ requirement persisted in definitions of piracy well after that time, when the phenomenon of privateering had clearly ceased. The most compelling explanation as to why the ‘private ends’ requirement was incorporated into the Harvard Draft is that ‘the researchers of the Harvard Draft obviously thought the crime of piracy was passé’.24 This explanation is supported by some of the comments that accompanied the Harvard Draft: ‘one remembers that large scale piracy disappeared long ago, and that piracy of any sort on or over the high sea is sporadic’.25 Furthermore, as one commentator has noted in describing the Harvard Draft as an exercise in de lege ferenda, the document ‘must be evaluated on its own merits as a legislative proposal, and cannot be supported as a reflection of a scholarly analysis of precedent and theory’.26

In other words, when the Harvard Draft was compiled in 1932, piracy was not perceived as a particularly pervasive problem by the community of nations. Thus, it can be inferred that the researchers adopted, for the sake of simple expediency, an old definition of piracy that had its origins in the era of privateering, since that definition had already been accepted as part of customary international law. However, recent statistics, such as the more than 700% increase in

18 Goodwin (n 1) 981.
19 Kontorovich (n 4) 211.
20 Harvard Research in International Law, 'Draft Convention on Piracy with Comments' 26 AM. J. INT’L L. 743 (Supp. 1932) [Harvard Draft]. Article 3 states: ‘Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:
  1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air.’ (emphasis added)
21 United Nations Convention on the High Seas (Geneva 29 April 1958) 450 UNTS 82, Article 15: ‘Piracy consists of any of the following acts:
   (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft […]’ (emphasis added)
22 Supra (n 5), Article 101.
24 Dubner (n 23).
26 Rubin (n 23) 340, 341.
actual and attempted pirate attacks that took place in the Gulf of Aden (off the coast of Somalia) between 2007 and 2008, suggest that some of the premises underlying the Harvard Draft are no longer valid. Piracy is now a pervasive problem. In the absence of any privateering on the high seas, the old ‘private ends’ element of the definition of the crime is now clearly dated. It is therefore time to reexamine the definition of piracy with a view to actually extinguishing the crime, rather than simply determining the least contentious characterization of piracy.

2. The ‘High Seas’ Requirement

During the eighteenth century, when customary international laws regarding piracy were beginning to crystallize, a state’s territorial waters were limited to distances extending approximately three nautical miles from the adjacent coast. This generally accepted rule of international law was originally based upon the ‘cannon shot’ principle of sovereignty, namely that a state was entitled to claim sovereignty over a territorial sea if the state was capable of exercising sovereignty over that body of water. Since the maximum range of land-based cannons at the time was only 3 NM, and since such cannons were essentially the only means of enforcing a state’s claim to sovereignty, the custom at international law was for states to claim sovereignty over 3 NM territorial seas. The high seas, then, became all waters to seaward of states’ territorial seas.

The rationale for confining the application of the definition of piracy to acts that take place ‘on the high seas’ was presumably that the crime ‘interfered with international shipping on the high seas. If this interference occurred in territorial waters, the coastal state could resolve this situation by enacting its own municipal legislation’. In other words, at the time when the definition of piracy began to emerge at customary international law, there was a presumption that states were capable of prescribing and enforcing laws within their territorial jurisdictions, including their 3 NM territorial seas. This presumption made it unnecessary for the community of nations to consider how to treat ‘piratical’ acts that took place other than on the high seas, since such considerations were more properly left to sovereign coastal states.

However, the presumption that was perhaps valid during the 18th century, when a strong coastal battery of cannons may have been all that was required to deter pirates from operating within a state’s territorial sea, and when a much greater mass of water constituted ‘the high seas’, is now untenable in the face of contemporary realities. Pirates are no longer easily identified or engaged from ashore, and now often base their operations from aboard innocuous-looking mother ships (such as tug boats or fishing vessels), from which they launch swarms of smaller ‘attack boats’ in order to seize target vessels. Naval and water-borne police forces have become the most effective means of countering piracy in coastal waters. Consequently, some

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29 Dubner (n 23) 17.
30 Territorial seas can now extend to 12 NM from a coast: see Article 3 of UNCLOS (n 5). Furthermore, some states, such as China, have essentially declared their entire 200 NM exclusive economic zones (EEZs) to be territorial seas: see Niclas Dahlvang, ‘Thieves, Robbers & Terrorists: Piracy in the 21st Century’ (2006) 4 Regent J Int’l L 17, 24. These developments have collectively had the effect of shrinking the ‘high seas’ by a substantial amount.
31 IMB Annual Report (n 27) 24.
states are now incapable of combating piratical acts within their territorial waters, as they simply
do not have the requisite resources. As these observations indicate, the original justification for
restricting the crime of piracy to acts that take place on the high seas is no longer valid – it can
no longer be presumed that a state will properly exercise jurisdiction over maritime crimes
within its territorial sea. The international community should therefore reconsider the
appropriateness of the ‘high seas’ requirement contained within the prevailing definition of
piracy.

3. The ‘Two Ships’ Requirement

Article 101 of UNCLOS stipulates that piracy consists of acts committed by one ship or aircraft
and directed against another ship or aircraft. The original rationale for the ‘two ships’ element of
the definition is that acts committed onboard a single ship were deemed to be of concern to only
the vessel’s flag state, and were not properly the subject of international law: ‘At least in the
Harvard Draft Convention on Piracy, the language was intended to exclude from universal
jurisdiction criminal acts by one passenger or crew member against another, or mutiny against
the captain, where the ship continued to accept the authority of the flag state’. 32

In other words, the community of nations did not need to become concerned when, for
example, one passenger committed a theft against another passenger onboard a ship making a
trans-Atlantic voyage, because the laws of the vessel’s flag state could appropriately proscribe
such criminal conduct. Since pirates, in times past, operated from their own vessels and only
seized other ships after attacking them from the pirate ship, the ‘two ships’ requirement
contained within the definition of piracy was initially not problematic. 33

However, contemporary pirates do not always use their own ships as attack platforms. ‘Today,
terrorists such as the hijackers of the Achille Lauro seize a ship, threaten its passengers and kill
them without regard to the flag it flies or the nationality of the victims. […] they do so by
boarding the ship disguised as crew or passengers, rather than by attacking it from another
ship’. 34

As the phenomenon of maritime hijacking demonstrates, piratical acts can originate from
within a single ship. Furthermore, it is apparent that such hijackings are of concern to the
international community as a whole: hijackers implicitly reject the authority of a flag state when
they seize a vessel, and their actions, unlike the actions of petty thieves at sea, tend to have far-
reaching international consequences. Thus, while it remains important for international law to
distinguish between minor criminal offences that take place at sea (which can best be punished
under municipal laws) and piratical acts that clearly have international effect, the distinction
should not rest, as it does now, on the ‘two ships’ requirement found within Article 101 of
UNCLOS. Clearly, the definition of piracy must be modernized to incorporate piratical acts such
as hijacking and suicide-bombing, even though these acts are completed aboard a single vessel.
In examining the origins of the ‘private ends’, ‘high seas’ and ‘two ships’ requirements of the
definition of piracy, it has become evident that many or all of the original justifications for these
elements of the crime have become obsolete. Since the crime of piracy has evolved over the
years, and since the global socio-political dynamic has changed drastically from the time when
the definition of piracy first emerged at international law, it seems illogical for the international
community to continue to insist that piratical acts must conform to clearly dated requirements in

32 Halberstam (n 6) 290.
33 Halberstam (n 6) 289.
34 Ibid.
order to be truly considered piracy. Thus, with the underlying rationales for the enumerated requirements now deconstructed, we are free to contemplate the form that a more appropriate definition of piracy might take.

III. CONTEMPORARY PIRATES: EXPLOITING DEFICIENCIES IN EXISTING INTERNATIONAL LAW

In order to appreciate what a new definition of piracy ought to include, it is first necessary to understand more specifically what the phenomenon of ‘piracy’ has become over the last thirty years. By looking at several high-profile incidents of maritime violence since the 1980s, and by carefully considering the current problem of piracy in and around Somali territorial waters, some of the key features of a new definition of piracy at international law should become apparent. The objective of this section of my paper is to work out a new definition of piracy by analyzing certain acts that we, as a global community, collectively and intuitively recognize to be acts of piracy35 (notwithstanding their non-conformity to the formal legal definition of the crime at international law), in order to establish certain elements that are sufficient to constitute the crime.

A. The Achille Lauro Incident

On October 7, 1985, the Achille Lauro, an Italian cruise ship, was hijacked off the coast of Egypt, possibly inside Egyptian territorial waters.36 The offending Palestinian pirates demanded that Israel free 50 Palestinian prisoners in exchange for the release of Lauro.37 The vessel was held by pirates for 44 hours, during which time they killed one handicapped American.38 The pirates eventually surrendered without any ‘preconditions’.39

The Lauro incident is significant because the offending act itself fails to meet several elements of the formal definition of piracy, but it was nonetheless repeatedly characterized as piracy by the United States,40 and by legal scholars.41 The seizure may not have taken place on the high seas, it was performed for clearly political purposes (the release of Palestinian prisoners), and it was effected by individuals who boarded the cruise ship as passengers before they took control of the vessel.42 Do these facts change the reality that the unlawful taking of a vessel at sea by force is, for all practical purposes, piracy? Should pirates be able to avoid the stigma and the punishments associated with their crimes simply because their acts were staged from a single vessel, or because they were committed in support of a ‘liberation’ organization’s political goals?

There appears to be no valid reason for excluding the type of crime perpetrated by the Lauro pirates from the domain of international sea piracy laws. As one commentator has noted, characterizing the Lauro incident as piracy would be ‘more in accord with reason,’ since ‘there

35 Rubin (n 23) 384, describes the collective perception today that most acts of maritime violence constitute piracy, or are at least called ‘piracy’ in the modern vernacular.
36 Based on the Lauro’s position near the extremity of Egypt’s territorial sea, there is some doubt as to whether the actual moment of seizure took place inside Egyptian territorial waters: see Gerald P. McGinley, ‘The Achille Lauro Affair – Implications for International Law’ (1985) 52 Tennessean L R 691, 695, 696.
37 500 on Liner safe, but 1 American Slain, SAN DIEGO UNION-TRIBUNE, Oct. 10, 1985 at A-1.
38 Ibid.
39 Ibid.
40 Halberstam (n 6) 270.
42 Halberstam (n 6) 269.
seems to be no sound basis for distinguishing between acts of depredation perpetrated by those who boarded from another ship’. Such criticisms of conventional law of the sea further suggest that ‘the Geneva Convention [and arguably its 1982 successor] should be regarded as merely indicating the extent to which a general agreement could be reached and should not be considered a final, definitive statement on the matter’. A second legal scholar has scathingly described UNCLOS as ‘at least as much the product of exhaustion and the dynamics of a group drafting committee as of logic or a knowledge of jurisprudence and history’. In other words, objectives of expediency in concluding treaties should not preclude international law from effectively developing in ways that benefit the international community, namely by facilitating the capture and prosecution of pirates.

The above discussion indicates that an argument can perhaps already be made that the definition of piracy at customary international law is more broad than that contained within UNCLOS Article 101, and that a process of divergence in these two sources of international law is now taking place. In any event, as the Lauro incident demonstrates, there are certainly compelling reasons why the definition of the crime should be expanded: acts of piracy now take on many different shapes, and conventional law of the sea is presently ineffective in responding to evolved forms of piracy.

1) The Vietnamese Boat People: Pirates Preying on Refugees

In a particularly disturbing account of the plight of refugees attempting to flee Vietnam by boat during the 1980s, Barry Dubner describes how countless refugee vessels transiting from Vietnam to Thailand and Malaysia were set upon by pirates during their voyages. Personal narratives indicate that, apart from pirate assaults and robberies, it was common for the young women onboard to be subjected to repeated rapes, after which they were either left stranded on disabled boats, or were cast into the sea.

In order to better appreciate the legal problems created by piratical acts against these refugees, Dubner points to a study that evaluated global incidents of maritime violence between 1989 and 1993. The study found that 54% of the attacks across the world took place in the South-East Asian region that includes Vietnam, Thailand, Malaysia, Singapore and Indonesia, and that 62% of the attacks took place within the territorial waters of a state. Given the littoral geography of South-East Asia, it is likely that many, if not most, of the attacks in that region took place within territorial waters. In other words, many of the horrific abuses of Vietnamese refugees described by Dubner may not formally have constituted piracy because they were not committed upon the high seas. While all of these abuses were taking place, however, marauders in the area operated with ‘virtual immunity’ as a result of the lack of anti-piracy measures’ implemented by coastal states. Basically, states with the jurisdiction to prevent piratical acts in their waters did nothing to defend the Vietnamese refugees.

Thus, in order to protect vulnerable peoples, Dubner convincingly argues (and I agree with him) that the crime of piracy should not be restricted to only those acts that take place upon the high seas. While acknowledging that such a change to the definition of piracy would intrude somewhat on the sovereignty of coastal states, Dubner explains himself as follows:

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43 McGinley (n 36) 697.
44 Ibid.
45 Rubin (n 23) 366.
46 Supra (n 23) 2, 6.
47 Ibid. 22, 25.
48 Ibid. 27.
Those of us who believe deeply in international law, as I do, should not be offended by allowing a breach of a sovereign right when the human rights of hapless refugees are violated on such a wide scale. The means to compensate any state for damages it may suffer due to warship incursion into its territorial waters exists today. Yes, there will undoubtedly be abuse at some point in the future. This abuse may take the form of intimidation or excess, and may be an affront to the sovereignty of a state. However, it would be simple for a state to deny access to its territorial waters by relating this to the offending state in advance and by resolving any maritime violence problem within its own waters. Why should the state be entitled to the shield of sovereignty, when it refuses to solve the problem in its own waters?  

Dubner’s argument in protection of refugees, while persuasive in its own right, could extend to almost all victims of piracy and maritime violence. Although refugees are vulnerable, so too are the crews of merchant vessels and private yachts: pirates, who generally reject the laws of all states, are usually armed and dangerous, while other sea-farers are subject to the laws of their flag states, which in almost all cases preclude them from carrying weapons. If a coastal state is unwilling to protect a ship that exercises her right of innocent passage through territorial waters, and the laws of the vessel’s flag state prevent her from protecting herself by way of armed response to piracy, then the vessel is arguably just as vulnerable as a refugee boat.

Ultimately, Dubner’s account of the Vietnamese boat people, while somewhat emotive, accurately demonstrates how the face of piracy has changed since the drafting of the 1958 and 1982 law of the sea conventions. Pirates now increasingly prey on the vulnerable. They take advantage of the restrictions that domestic and international laws place on states that would seek to combat maritime violence, and on vessels that would seek to defend against pirate attacks. In light of these developments in the practices of pirates over the past 30 years, perhaps the time has come for more statesmen and scholars who ‘believe deeply’ in international law to speak out in favour of amending the definition of piracy. Perhaps the international community should now allow capable states to apprehend pirates wherever they operate on the seas, in order to better protect vulnerable seafarers such as the Vietnamese boat people.

2) Pirates in the New Millennium: The Somalia Problem

A full history of the present conflict ashore in Somalia is not essential to our understanding of the problem of piracy off the Somali coast. It is sufficient to say that, due to internal struggles for power between regional and clan-based political groups, Somalia has lacked a federal government in control of its entire territory since 1991, and that the Transitional Federal Government (TFG) ‘has only limited control over Somalian territory’. The waters in and around Somalia have been increasingly plagued by instability and piracy over the last several years, and the connection to developments on land appears to be causal: the ‘lawlessness at sea

49 Ibid. 40.
50 In 2008, guns and knives were used in over 70% of the reported maritime attacks throughout the world: IMB Annual Report (n 27) 13.
51 Ibid. 39.
52 Guilfoyle (n 10) 691.
clearly follows from the chaos on the Somalian shore’. To make matters worse, humanitarian relief efforts by the World Food Program (WFP) directed at aiding the situation in Somalia may have actually fueled the piracy problem: WFP vessels have twice been hijacked and ransomed within the past two years, in February 2007 (MV Rozen) and May 2008 (Victoria). Evidently, pirates in the region have no greater regard for vulnerable peoples (including those starving ashore in Somalia) than did the pirates operating against Vietnamese refugees in South-East Asia.

The problem of piracy in Somalia represents an evolution in the phenomenon of the crime, however, for a variety of reasons. First, contemporary Somali pirates are better armed and better organized than others have been in the past. These pirates employ automatic rifles and rocket propelled grenades (RPGs) in their attacks; they operate using dedicated mother ships and attack vessels, which has allowed them to extend their reach much farther from Somali shores; and, they attack larger and faster vessels, and vessels with higher freeboards. The IMB posits that these advances in pirate capabilities, coupled with ‘the inability of the Somali government to respond’, has created an environment where ‘the risk to reward ratio for the Somali pirate is so large that only robust measures by international governments and navies will enable the safety and security of this major trade route to be restored’. It appears that the level of sophistication demonstrated by Somali pirates in recent years may have been beyond the contemplation of the drafters of law of the sea conventions, and that a new approach to combating piracy (starting with a new definition of the crime) is therefore now in order.

Contemporary Somalian piracy is also an evolutionary form of the crime in that pirate endeavours now serve as a source of funds for terrorist and insurgent groups. Although academic commentators have long speculated about the links that exist between terrorist organizations and pirates, even the United Nations Security Council is now prepared to admit the connection: both UNSCR 1844 and 1851 note ‘the role piracy may play in financing embargo violations by armed groups’, in and around Somalia. Based on the ‘private ends’ requirement contained within Article 101 of UNCLOS, it is clear that the drafters of that convention did not foresee the emergence of symbiotic relationships between pirates and terrorists. Since, however, the suppression of piracy in certain instances would now lead to an indirect reduction in the funds available to associated terrorist groups, it is equally apparent that the international community has a kind of ‘double interest’ in combating such forms of piracy. Thus, as the Somalia situation demonstrates, there is now a strong impetus to modernize both the

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53 Ibid.
54 Ibid. 692.
55 See UNSC Res 1851 (2008), at the second preambular paragraph: ‘…and noting that pirate attacks off the coast of Somalia have become more sophisticated and daring and have expanded in their geographic scope, notably evidenced by the hijacking of the M/V Sirius Star…’
56 IMB Annual Report (n 27) 23.
57 Ibid. 24.
58 Ibid. 26. The term ‘freeboard’ refers to the height of a vessel’s upper decks from the waterline. From the observation that pirates are hijacking vessels with higher freeboards, we can draw the inference that pirates must also be using more sophisticated boarding equipment, including perhaps mobile boarding ladders and grappling devices.
59 Ibid.
60 See Dahlvang (n 30) for a general discussion of, among other things, the links between maritime violence and terrorism ashore.
TRADING THE SHIELD OF SOVEREIGNTY FOR THE SCALES OF JUSTICE:  
A PROPOSAL FOR REFORM OF INTERNATIONAL SEA PIRACY LAWS

‘private ends’ and ‘high seas’ elements of the definition of piracy at international law, as such a measure would deal a blow to both pirates and terrorists.

Somali piracy is also evolutionary because perpetrators of certain recent maritime crimes in the region have claimed to be acting in defence of national ‘environmental’ or ‘fisheries’ interests, which might bring the scope of their actions out of the ‘private’ and into the ‘public’ domain. Apparently the chaos ashore in Somalia and the lack of an effective central government has led to exploitation of Somalia’s EEZ by fisherman of other African nations, and to illegal dumping of toxic waste in Somali waters. However, as Guilfoyle points out, the foundations for Somali pirate claims in defence of national interests are somewhat tenuous: ‘the first pirates to claim to be acting to deter foreign fishing held to ransom the crew of a barge, not a fishing vessel’. Nonetheless, Somali pirates demonstrate an understanding of the limitations of international law in their anti-fishing and anti-dumping claims that should cause concern to the international community, as these claims may, on the right set of facts, provide pirates with a full defence to charges of piracy that was surely not contemplated by the drafters of the law of the sea conventions.

Finally, the current Somali piracy problem represents an evolution of the crime by virtue of the sheer magnitude of the attacks in the area. As I indicated above, there has been a seven-fold increase in the number of actual and attempted attacks in the Gulf of Aden from 2007 to 2008, and it appears, anecdotally, that the increasing trend is continuing into 2009. Furthermore, pirate attacks in Somali waters and the Gulf of Aden accounted for 38% of all global attacks in 2008 – approximately triple the number of attacks that took place in the next most dangerous maritime areas off the coasts of Nigeria and Indonesia, respectively.

It has been estimated that the cost of piracy to the world economy (in the form of ransoms, insurance premiums, days lost in port for investigation purposes, naval protection measures, etc.) is approximately $25 billion annually. However, as Niclas Dahlvang notes, this figure ‘this does not tell the whole story, as underreporting of pirate attacks has been estimated at anywhere between 20 and 2,000 percent’. Taken in their entirety, then, the above statistics suggest that the rapid growth of the piracy phenomenon in and around Somalia merits renewed consideration by the international community. It can no longer be said that piracy is passé, or that it is not a serious threat to international security and the world economy. A new definition of piracy that reflects and allows for suppression of contemporary forms (and quantities) of the crime is now apposite.

3) A Suggestion for a New Definition of Piracy

The Lauro incident teaches us that pirates can attack within a state’s territorial waters, and that

62 Guilfoyle, (n 10) 692.
63 Ibid. at 699.
64 Part II.A.
65 My impressionistic assertion has been confirmed by the IMB’s Quarterly Report for the first quarter of 2009, dated April 2009. During the whole of 2008 in fact there have been a total of 92 actual and attempted attacks in that region, while during just the first three months of 2009 there have been 41: that implies that, if the trend continues, by the end of the year we could face an increase in piracy acts in the Somali and Gulf of Aden region of about 80%.
66 IMB Annual Report (n 27) 5, 6.
67 Dahlvang (n 30) 18.
68 Ibid.
their motivations may often contain both ‘private’ and ‘political’ elements. The saga of the Vietnamese boat people suggests that pirates now tend to prey upon the most vulnerable sea travelers in areas where attackers are free to act with impunity. More recently, incidents of piracy in and around Somalia demonstrate that the crime has wholly transformed from its earlier origins – piracy in the area is sophisticated, ubiquitous, and is funding other forms of undesirable insurgent activity. With the benefit of these observations, the goal of this paper is now to posit a more appropriate definition of piracy.

In attempting to define piracy in 1932, the Harvard researchers lamented the fact that there was no consensus regarding the definition of the crime. They criticized the methodology employed by other scholars who had attempted to define piracy, saying, ‘of the many definitions which have been proposed, most are inaccurate, both as to what they literally include and as to what they omit. Some are only impromptu, rough descriptions of a typical piracy’. Implicit in the researchers’ comments, however, is their unspoken belief that an objective definition of piracy must exist and somehow be capable of derivation from abstract principles. This belief appears to have driven the researchers to contemplate the legal meaning of piracy independent of practical considerations, such as the form that more unconventional or evolutionary forms of piracy might take in the future.

Unlike the Harvard researchers, I believe that the creation and modification of international law ought to be a practical, rather than a strictly academic endeavour. International law is a tool that should exist to serve the needs and objectives of the community of nations; as such, the exercises of creating and codifying international law should be performed with reference to (rather than in deliberate ignorance of) practical considerations, such as what comprises a typical pirate attack. In other words, I believe that international law must define piracy in terms of the modern realities of maritime violence if the law is to successfully achieve the international goal of suppressing such crime.

On the basis of these philosophical assertions, I would therefore suggest that a new basic definition of piracy should be phrased as follows: ‘**piracy consists of any acts of violence or detention, or any act of depredation, committed at sea**’. The phrase ‘at sea’ should be interpreted to mean ‘in any waters other than the internal waters of a state’. As one can see, the proposed definition would encompass all of the various forms of maritime violence and crime described above in sections III.A-III.C, including hijacking, rape, and murder, regardless of the motives of the perpetrators, and regardless of the location of the crimes on the seas. I willingly concede that there is no ‘principled’ (or ‘theoretical’, or ‘academic’) basis for the adoption of such a definition, other than that it would bring the definition of piracy into conformity with the actual phenomenon of the crime. However, I would suggest that not only is this a **valid** reason for adopting a more appropriate definition of piracy, but it should also be an **overriding** reason to do so, since international law can only remain an effective tool in accomplishing global anti-piracy objectives if such a change to the content of the law is made.

**IV. THE CONTENTIOUS MATTER OF UNIVERSAL JURISDICTION OVER PIRACY**

It is unlikely that a movement to expand the definition of piracy at international law would have much effect on sovereign states or would encounter significant resistance from the international community, were it not for the fact that universal jurisdiction attaches to the crime of piracy. A typical application of the principle of universal jurisdiction would allow any state to apprehend and prosecute those who have committed acts of piracy, regardless of the nationality of the

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69 Harvard Draft (n 20) 769.
accused, and regardless of the location where the crime was allegedly committed (recalling that the crime currently only consists of acts that take place on the high seas), ‘provided of course that [the alleged pirates] have been apprehended on the high seas or within the territory of the state concerned [with the prosecution]’.

Thus, any change to the definition of piracy could (and likely would) result in changes to the rights and obligations of sovereign states at international law. Specifically, by eliminating the ‘high seas’ requirement of the crime, the definition of piracy that I have proposed in this paper would, at a minimum, create a right for any sovereign state to adjudicate on matters that have taken place inside the territorial seas of other states.

Such a change could be problematic; as one commentator has observed, ‘universal jurisdiction can have dangerous consequences [because it] is not premised on notions of sovereignty or state consent. Rather, it is intended to override them’. Before adopting a new definition of piracy, then, one must ask whether such intrusions into the jurisdictions of sovereign states is desirable and/or necessary at international law. In order to answer these questions, I will first summarize three different ways in which the doctrine of universal jurisdiction might be applied to crimes of piracy, from least to most controversial applications of the doctrine.

It is beyond the scope of this paper to canvass the full spectrum of authorities in favour of and opposed to the idea of universal jurisdiction over international crimes in general – countless advocates and critics have commented on the principle, and have offered compelling arguments for and against the existence of such a head of jurisdiction at international law. It would be difficult to deny, however, that universal jurisdiction currently exists as a valid basis of criminal jurisdiction at international law for certain crimes, including piracy, war crimes, crimes against humanity, and genocide.

There is some disagreement, however, as to the scope of universal jurisdiction over such crimes. Cassese has suggested that there are two notions of universal jurisdiction: the narrow notion, also called ‘conditional’ universal jurisdiction, and the broad notion, also called ‘absolute’ universal jurisdiction. According to the narrow principle, a state may only prosecute an accused who is already present on the territory of the state. According to the broad principle, however, a state may prosecute an accused regardless of where he is in the world – a state could try the accused in absentia (if so permitted by its municipal legal system), and could commence a criminal investigation without having custody of the accused. As I will later explain, I believe a third, even more broad notion of universal jurisdiction can be incorporated into Cassese’s list, specifically for dealing with piracy offences.

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71 It is unlikely that the elimination of the ‘private ends’ and ‘two ships’ requirements of the crime in my proposed definition would cause any sovereignty problems between states. I recognize that elimination of the ‘private ends’ requirement could theoretically impinge on the sovereignty of any state that authorized vessels registered in the state to engage in privateering, but I suspect that the practice of sanctioning privateering has already been rendered illegal by customary international law.
72 Kontorovich (n 4) 184.
73 See, for instance, Henry J. Steiner, ‘Three Cheers for Universal Jurisdiction – Or is it Only Two?’ (2004) 5 Theoretical Inq L 199, for a thorough recap of various arguments for and against the principle of universal jurisdiction.
74 Shaw (n 70) 668, 673.
75 Cassese (n 17) 285, 291.
76 Ibid.
I will begin by examining potential arguments against the definition of piracy proposed by this paper that might be grounded in the first notion of universal jurisdiction. While the crime of piracy, by current definition, only consists of acts that take place outside the (normal territorial) jurisdiction of any state, war crimes, crimes against humanity and genocide can all take place anywhere in the world, within any state, and still be subject to the principle of universal jurisdiction. What this means is that states already accept limits on their sovereignty in the context of universal jurisdiction crimes: they accept that acts of genocide, for instance, that are committed on their soil may be prosecuted and punished by any state according to principles of universal jurisdiction. In a maritime context, coastal states also already accept limits on their sovereignty within their territorial seas, since international law obliges coastal states to allow all vessels the right of innocent passage through such seas. Finally, flag states already accept limits on their jurisdiction over ships registered in their states, since any state, and not just the flag state, may prosecute the crew of a ship alleged to have committed piracy. As all of these examples demonstrate, sovereignty is not absolute: ‘the influence of international law is beginning to make itself felt in areas hitherto regarded as subject to the state’s exclusive jurisdiction’.

Thus, an adoption of the definition of piracy proposed within this paper would result in an incremental change to the rights of sovereign states at international law, rather than in a wholesale reordering of those rights. The proposed definition would simply add the crime of piracy to the list of crimes already subject to the principle of universal jurisdiction within the territory of a sovereign state. It would create but one more minor intrusion into the sovereignty of coastal states over their territorial seas, where they already accept similar intrusions. It seems unlikely that the international community would object to such an innocuous change to the law of piracy.

Some opposition to the new definition might arise in the form of a ‘slippery slope’ argument, or an argument that the addition of piracy to the list of universal jurisdiction crimes that result in limitations on a state’s sovereignty might create an undesirable precedent for the expansion of universal jurisdiction in general. Such an argument might posit alarmist questions, such as, ‘Where will it end? If we allow incursions into state sovereignty for the purposes of suppressing piracy, what will be next? Will a state then be able to claim universal jurisdiction over simple thefts that take place in another state?’ I think, however, that piracy’s long history as a universal jurisdiction crime distinguishes it from other crimes of less international significance. In other words, a revised definition of piracy would not create a new universal jurisdiction crime; rather, it would simply expand the geographical and conceptual area in which the existing universal jurisdiction crime of piracy can be committed. Piracy, then, stands on a ‘slope’ unto itself, rather than at the top of a slippery slope shared with other domestic crimes.

Based on the above discussion, it is apparent that conditional universal jurisdiction arguments against the definition of piracy proposed by this paper are not particularly persuasive: the new definition, by itself, would have a minor effect on existing rights of sovereign states, and would not dramatically alter the current universal jurisdiction landscape. The corollary of this conclusion, however, is that the proposed change to the definition of piracy, without more, would also prove ineffective in facilitating anti-piracy measures and in suppressing the phenomenon of

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77 UNCLOS (n 5) Articles 17-26.
78 Shaw (n 70) 648.
TRADING THE SHIELD OF SOVEREIGNTY FOR THE SCALES OF JUSTICE: A PROPOSAL FOR REFORM OF INTERNATIONAL SEA PIRACY LAWS

maritime violence as a whole – it would be a semantic change with little to no associated practical benefit.

B. Broad / Absolute Universal Jurisdiction

Recall that, according to the broad notion of universal jurisdiction, states may prosecute relevant crimes without the accused first being situate within the territory of the state. Formally speaking, the exercise of such jurisdiction might be considered a substantial intrusion into the sovereignty of a state where a crime was committed, since it could result in the issuance of arrest warrants and subpoenas, and even in convictions. Practically speaking, however, the exercise of absolute universal jurisdiction is unlikely to have any real effect on the sovereignty of a state where a crime took place, since an offender will never actually be brought to justice in the prosecuting state unless he or she is extradited to that state, or enters it voluntarily. As Cassesse has noted, the high probability of an accused evading prosecution in this manner would simply result in a waste of the prosecuting court’s resources without much prospect of successful apprehension of the accused. In other words, states would be unlikely to prosecute without first having custody of the accused, and in the infrequent cases when a state decided to prosecute in any event, the impact on other sovereign states would be negligible.

In this respect, it seems unlikely that the community of nations would oppose the definition of piracy proposed in this paper on the basis of absolute universal jurisdiction arguments. Regardless of whether a narrow or a broad notion of universal jurisdiction is envisaged, the proposed definition does not substantially affect the rights of sovereign states at international law – as a minimum, the new definition would allow any state to prosecute pirates found within the state, and as a maximum, it would allow any state to prosecute pirates wheresoever situate, but in neither case would it allow a state to apprehend pirates within the territory of another state. The proposed definition, according to normal notions of universal jurisdiction, would not allow physical intrusion of the forces of one state into the territory of another state.

Again, the corollary of this conclusion regarding the effect of a new definition of piracy, even according to broad principles of universal jurisdiction, is that the change to the definition would not result in less piracy, or better suppression of piracy. At most, the application of absolute universal jurisdiction principles might result in more (unenforceable) arrest warrants for pirates, or more (in absentia) convictions for offences of piracy, but these would be only symbolic anti-piracy actions. Judicial decisions and orders made under the umbrella of absolute universal jurisdiction would not have any tangible effect on the operations of pirates who choose to remain inside the territorial waters of a state that cannot or will not apprehend them, as the pirates would continue to remain outside of the enforcement jurisdiction of all other states.

C. Extreme Universal Jurisdiction

In light of the fact that neither narrow nor broad notions of universal jurisdiction over the crime of piracy are likely to facilitate effective anti-piracy measures, I believe that a new universal jurisdiction paradigm is now mandated for the crime of piracy. The concept that I advocate is simple: all states must be permitted to enter the territorial seas of other states for the purposes of

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79 Cassese (n 17) 286, 87.
80 Ibid. 290.
apprehending suspected pirates. This extreme notion of universal jurisdiction would give states not only the power to prescribe anti-piracy laws and to enforce those laws under rare or symbolic circumstances, but it would also allow capable states to actively seek and apprehend pirates off the shores of other states where the pirates can actually be found.

I acknowledge that this concept of universal jurisdiction is antithetical to traditional notions of a ‘Westphalian’ international legal order in which state sovereignty is the single overriding principle. I also recognize that my proposal for the expansion of universal enforcement jurisdiction over acts of piracy is, at first glance, somewhat radical. Upon closer scrutiny, however, it is apparent that legal commentators have already begun to advocate changes similar to those that I propose, and that the practice of states is beginning to shift toward exercises of this kind of extreme universal jurisdiction.

In his comprehensive book on the subject entitled The Law of Piracy,\textsuperscript{81} Alfred Rubin reviews the positions of numerous natural law scholars who suggest that current rules of jurisdiction serve as an inhibition to effective anti-piracy action. These scholars argue in favour of expanded enforcement jurisdiction over piracy, which would basically allow international forces to ‘police’ piracy wherever it occurs on the seas, rather than restricting the reach of such naval forces to only the high seas.\textsuperscript{82} Dubner’s sentiment\textsuperscript{83} that states should not be able to complain about violations of their sovereignty when they have failed to address serious crimes taking place in their own waters,\textsuperscript{84} essentially summarizes the natural law argument in favour of extreme universal jurisdiction. In assessing the recommendations of these commentators, however, Rubin suggests that many of them fail ‘to consider the impact of the Westphalian legal order on notions of “universal” offenses’.\textsuperscript{85} Thus, Rubin ultimately concludes that these ‘pleas by others to change the legal order so that powerful states can be secure in their commerce are almost certain to fail, however persuasive their logic seems’.\textsuperscript{86}

It should be noted, however, that Rubin’s work was published in 1998, at a time when piracy had not yet taken on the kind of endemic proportions that were seen in the Somali region over the last year, and at a time when states were less willing to surrender or delegate elements of their sovereignty over criminal law to others. Some of the changes that have taken place in the general culture of international criminal law since 1998 can be seen in the Rome Statute of the International Criminal Court, which came into force on July 1, 2002.\textsuperscript{87} Among other things, the Rome Statute confers jurisdiction on the International Criminal Court for certain crimes that would otherwise fall within the jurisdiction of individual states according to more conventional territorial or passive personality bases of jurisdiction.\textsuperscript{88} Although the crime of piracy is not mentioned in the Rome Statute, the convention nonetheless demonstrates that states now accept the idea of (and willingly seek to bestow upon others) extra-national jurisdiction over important crimes of international concern. Since piracy is clearly becoming such a crime, some expansion of the concept of universal jurisdiction over the crime would not be inconsistent with general trends in international law.

\textsuperscript{81} Supra (n 23).
\textsuperscript{82} Supra (n 23) 376, 381.
\textsuperscript{83} Supra section III.B.
\textsuperscript{84} Supra (n 23).
\textsuperscript{85} Ibid. 379.
\textsuperscript{86} Ibid. 377.
\textsuperscript{88} Ibid. Article 5.
More specific evidence of the expansionary universal jurisdiction trend, particularly as it relates to piracy, can be seen in recent UN Security Council resolutions that address the problem of piracy in Somalia. UNSC Resolution 1816,\(^9\) adopted on June 2, 2008, authorized states to enter Somali waters for the purpose of suppressing piracy:

The Security Council, […]

7. Decides that for a period of six months from the date of this resolution, States cooperating with the TFG\(^9\) in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:

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

(b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery;\(^9\)

The authority granted in this resolution was extended for an additional 12 months, until December 2, 2009, by UNSCR 1846.\(^9\) Finally, when it became apparent that some form of land-based anti-piracy action would be needed to supplement similar maritime endeavours, the UNSC decided that for a period of twelve months from the date of adoption of resolution 1846, States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law.\(^9\)

Although it is important to note that all anti-piracy actions taken on authority of the above resolutions require the consent of the TFG, it is equally important to recall that the TFG exercises only limited control over the territory of Somalia, and therefore cannot truly be considered the government of a ‘sovereign state’. In other words, the TFG might consent to anti-


\(^{90}\) Transitional Federal Government

\(^{91}\) UNSCR 1816 (2008).

\(^{92}\) UNSCR 1846 (2008) (n 61).

\(^{93}\) UNSCR 1851 (2008) (n 61).
piracy operations by foreign armed forces in areas of Somalia where a local warlord exercises control, and over which the TFG has no de facto authority. In this respect, international law, in the form of a Security Council resolution, currently authorizes states to violate the sovereignty of de facto local governments, without their permission, for the purposes of suppressing piracy. This reality indicates that a proposal (such as the one that I advocate in this paper) to allow states to enter territorial waters of other states for the purposes of suppressing piracy is far less intrusive upon sovereign state rights than other measures that have actually been endorsed by the UNSC within the last four months.

I am obviously not suggesting that recent UNSC resolutions have created unqualified rights at customary international law for states to penetrate the territorial seas of other states. In order for a new custom to be found at international law, both an opinio juris and a widespread practice of states would need to be established in support of the custom,94 and neither of these elements can yet be made out with respect to anti-piracy actions. I am, however, suggesting that the UNSC resolutions cited above tend to demonstrate that the international community is now willing to set aside traditional Westphalian concepts of sovereignty, where required, in order to combat crimes of significant international concern.

In light of the body of scholarly commentary, most effectively propounded by Barry Dubner,95 that supports an expansion of universal enforcement jurisdiction over piracy, and in light of the UNSC’s increasing endorsement of anti-piracy enforcement measures within the territorial jurisdiction of states, can it really be said that my proposal to expand both the definition of piracy and the ability of capable states to suppress piracy is ‘radical’ or unworkable? I think there is ample evidence to suggest that the international community is now ready and willing to take decisive actions against pirates, even if such actions involve compromises to traditional concepts of state sovereignty.

V. POTENTIAL MECHANISMS FOR EFFECTING CHANGES TO THE LAW OF PIRACY

In broad terms, any change to international law must be implemented either by convention or by custom.96 The changes that I have proposed to the law of piracy in this paper, both in terms of the definition of the crime and the exercise of universal jurisdiction over the crime, would be most legitimate if they were adopted by way of treaty, since this source of international law most explicitly demonstrates the consent of states to submit to the law. However, it would likely be difficult to conclude or modify a universally accepted law of the sea treaty that incorporated such changes. Certain large coastal states, such as China, have ‘openly hindered anti-piracy efforts’,97 and would presumably oppose any treaty seeking to expand jurisdiction over piracy. Additionally, past attempts to combat maritime violence through treaties have failed to achieve success in certain key areas. For instance, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, which established an ‘extradite or prosecute’ regime for signatory states with respect to crimes of maritime violence, was not ratified by Indonesia or

94 Shaw (n 70) 74, 76.
95 Supra (n 23).
96 Although Article 38(1) of the Statute of the International Court of Justice (widely accepted as the authoritative and complete list of sources of international law – see Shaw (n 70) 70) lists other potential sources of international law, it should be noted that the ICJ has never decided a case solely on the basis of ‘general principles of law recognized by civilized nations.’

97 Dahlvang (n 30) 24.
Malaysia, ‘nations whose waters accounted for more than a third of reported pirate attacks in 2004’. 98

A more realistic means of implementing the changes proposed in this paper would be through the conclusion of a large (albeit not universal) multi-lateral suppression treaty that redefines and expands jurisdiction over piracy. Such a treaty, if accompanied by an emerging widespread practice of states to apprehend and prosecute pirates according to the expanded principles of the treaty, might be sufficient to alter the customary law of the sea landscape. As Judge Lachs (dissenting) remarked in the North Sea Continental Shelf Cases, not all states have ‘an opportunity or possibility of applying a given rule. The evidence [of customary international law] should be sought in the behaviour of a great number of States, possibly the majority of States, in any case, the great majority of the interested States’. 99 In other words, if a sufficient number of states ratified a treaty that defined piracy as ‘any acts of violence or detention, or any act of depredation, committed at sea’, and if these states all began to exercise universal jurisdiction over piracy offences that conformed to such a definition, then eventually it is conceivable that customary international law would recognize the legitimacy of such a definition. As long as the states concerned restricted their exercises of universal jurisdiction to so-called conditional or absolute notions of universal jurisdiction, then it would be difficult to find any breaches of international law in their actions.

It is more likely that a state seeking to exercise what I have termed ‘extreme’ universal jurisdiction would be found in breach of international law if that state were to enter the territorial sea of another state for the purpose of apprehending pirates. Two important points, however, must be made on this subject. First, any such intrusion into the waters of another state would arguably only entail a breach of the coastal state’s sovereign rights if the coastal state objected to the intrusion. It is conceivable that in many parts of the world where the exercise of extreme universal jurisdiction would be advantageous, such as present-day Somalia, coastal states would not object to the assistance of international forces in suppressing piracy. Second, even if a coastal state objected to the intrusion, it is possible that the provisions of a large, multi-lateral treaty could be enforceable against non-signatory states. Consider the Charter of the United Nations, for instance, which states, ‘The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security’. 100 While the UN is not likely to impose obligations contained within its Charter on non-member states, for the simple reason that almost all states are already UN members, it is nonetheless significant that the Charter contemplates the imposition of such obligations on non-member states, since this provision suggests that it would not be contrary to international law for a treaty to bind even those states that are not party to the treaty. Thus, if a piracy suppression treaty were to allow a member state to enter the territorial waters of another non-member state for the purpose of apprehending pirates, there is at least some argument that the treaty could excuse what would otherwise be a violation of the coastal state’s sovereign rights.

98 Dahlvang (n 30) 23.
<http://www.unhcr.org/refworld/country,,ICJ,,DEU,4562d8b62,4023a4e04,0.html> accessed May 12th, 2009.
100 Charter of the United Nations, 26 June 1945, CAN, TS 1945 No 7, at Article 2 paragraph 6 [Charter]
In light of the above discussion regarding possible ways of implementing more modern international piracy laws, I conclude that, over time, a combination of new treaty provisions and widespread state practices could lead to the emergence of a shift in customary law of the sea toward extreme universal jurisdiction over piracy.

VI. CONCLUSION

Contemporary piracy represents a large and complex threat to international security. The crime has evolved to the extent that it no longer conforms to its antiquated definition, and the rationales that underlie the ‘high seas’, ‘private ends’ and ‘two ships’ requirements of the crime have no relevance in the new millennium. Furthermore, the realities of the past 30 years have demonstrated that the phenomenon cannot realistically be suppressed within the existing framework of UNEmoji piracy laws. Clearly, some change to international law of the sea is required in order to deal with this growing problem of maritime violence, and few would dispute that a change eliminating the most obsolete elements of the definition of the crime is now apposite.

After considering other various possibilities for reform in the field of international piracy laws, Joshua Goodwin notes that, ‘the best answer to a question rarely lies at one of the extremes. Dealing with piracy is no exception’. 101 He then concludes that the best solution is simply to ‘rely on more conventional forms of jurisdiction such as the flag-state principle, the nationality principle, and the passive-personality principle’. 102 While I agree with Goodwin’s generalization about extreme solutions, I would suggest that contemporary piracy provides us with an example of one of the ‘rare’ instances in which extreme action is needed. States have always, in recent times, had the option of exercising jurisdiction over piracy on any of the bases that Goodwin lists, and yet the problem persists. Intuitively, it is easy to see why more accepted bases of jurisdiction cannot effectively facilitate the suppression of piracy: vessels of any flag, carrying passengers of any state, may fall victim to pirates, and yet only a few states have the naval and prosecutorial resources needed to bring pirates to justice. Should pirates then escape justice simply because the governments of their victims do not have sufficient resources to hold the criminals accountable? Universal jurisdiction, in contrast, allows the international community to effectively assign the task of apprehending and prosecuting pirates to those states that are most capable of doing so, regardless of the connections that these states might have to the relevant acts of piracy.

Even universal jurisdiction over piracy, however, will be frustrated if pirates are permitted to act with impunity while hiding within the territorial seas of states that cannot or will not bring them to justice. For this reason, an extreme notion of universal jurisdiction, unique to the maritime environment, is needed in order to address the current piracy problem: states must be permitted to flush out pirates wherever they are located on the seas, even within the territorial jurisdiction of other states. If such action is authorized by international law, as it has been under UNSC resolutions relating to Somalia, and as is recommended by numerous legal scholars, then the international community may well succeed in suppressing piracy in years to come. It is time for the community of nations to deny pirates the ‘shield of sovereignty’ behind which they have been hiding, and to offer them instead the ‘scales of justice’.

101 Supra (n 1)1010.
102 Ibid.