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I Introduction

The Somali pirates are dangerous. They are sea-terrorists, operating on a supra-national level: beyond the reach of any laws, in the name of no particular state, and against no specific nations. They enjoy complete impunity – most of the time, they are simply chased off, and if captured, they are often released. It would be unimaginable for the United States to capture an Al Qaeda operative, or a member of any other terrorist group, in order to then promptly release him or her, not wanting to bother with the cost and difficulty of a criminal prosecution. Yet, this is precisely what some countries, like Great Britain and France, have done with respect to captured pirates. They have let them go. And the other nations and maritime powers have, wrongly, not said a word about it. The global laissez-faire attitude toward the Somali pirates needs to change, and the United States’, as well as other naval nations’, passivity toward these sea-terrorists has to come to an end.

World powers like the United States should be willing to take on the Somali pirates for several reasons. First, the legal tools needed to capture and prosecute these pirates already are in place. The United Nations Security Council has facilitated the fight against Somali piracy, for countries willing to engage in such a fight, by passing five different resolutions during 2008. These resolutions authorize nations patrolling waters in the Indian Ocean off the Somali coast to cross into the 12-nautical-mile zone of Somali territorial waters if self-defending or pursuing pirates. Moreover, a combination of two different international conventions regulating the law of the seas arguably provides jurisdiction to try pirates to either the capturing nation, or to any third nation where the pirates have been rendered for prosecution.

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The author would like to thank Ekaterina Zabalueva for her invaluable assistance with the research and writing of this article.

1 See infra, Part VI.A.
2 See infra, Part V.A.
3 See id.
5 See infra, Part IV.B.
6 Id. Note also that Resolution 1851 also authorizes any piracy-fighting nation to enter the Somali land if battling against pirates. S.C. Res. 1851 (Dec. 16, 2008).
United Kingdom have even signed a memorandum of understanding with a regional partner, Kenya, whereby Kenya would try any pirates captured by the United Kingdom. Thus, world powers like the United Kingdom and the United States legally may apprehend and try Somali pirates; it is time that they actually do so. Second, pirates are sea-terrorists and may be or become linked to other terrorist groups. For now, we do not know whether the proceeds of piracy are financing other forms of terrorism. However, it is reasonably likely that the Somali pirates will be befriended by groups like the Taliban or Al Qaeda, for whom pirates can easily steal money and weapons. Furthermore, the Somali pirates, if linked to a terrorist group, may attempt to use the hostages that they are already holding (about 300 as of today) as political leverage against all sorts of unreasonable and politically dangerous demands. This type of hostage use is not novel – some may remember that back in the 1980’s, a faction of the Palestinian Liberation Organization hijacked an Italian cruise ship, the Achille Lauro, and refused to release the kidnapped hostages unless Israel released a group of Palestinian prisoners. The United States has been lucky until now: only one American ship was successfully hijacked by the Somali pirates, and after a three-day long stand-off in the Indian Ocean, all American hostages were safely rescued. In the future, the United States may not remain as fortuitous. The Somali pirates have already pledged that they would go after more American ships, and in the recent months, they have certainly done so (albeit, with no success). Thus, the threat of piracy linked to traditional forms of terrorism looms large for countries like the United States, which may become particular targets. Finally, not fighting the Somali piracy signals a message of passivity and carelessness to all sorts of potentially dangerous individuals and groups across the globe, looking to engage in similar types of criminal behavior. If the United States, or Great Britain, or France, is not willing to fight pirates in Somalia, then the Nigerian or Indonesian pirates may become the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 672, available at http://www.unodc.org/unodc/terrorism_convention_maritime_navigation.html [hereinafter SUA Convention] (last visited May 9, 2009); see infra Part IV.A. Eugene Kontorovich, International Legal Responses to Piracy off the Coast of Somalia, ASIL Insight, Vol. 13, Issue 2, Feb. 6, 2009, available at http://www.asil.org/insights090206.cfm (last visited May 13, 2009) [hereinafter Kontorovich]. U.S. officials believe that al-Qaeda has operatives in Somalia. Todd Pitman, Ending Somali piracy: few options for US forces, Apr. 14, 2009, available at http://www.ktar.com/?nid=46&sid=1122768 (last visited on May 13, 2009) [hereinafter Pitman]. See infra Part IV.A. See e.g., Elizabeth A. Kennedy and Katharine Houreld, US ship reaches Kenya minus kidnapped captain, Apr. 11, 2009, available at http://www.tdnews.com/story/2009/04/12/57151 (last visited on May 13, 2009) [hereinafter Kennedy & Houreld]; CNN, Pirates attack U.S. cargo ship but fail to get aboard, Apr. 14, 2005, available at http://www.cnn.com/2009/WORLD/africa/04/14/somalia.pirates.index (last visited on May 9, 2009) [hereinafter Pirates attack]; Richard Esposito, John Berman, and Aaron Katersky, Pirate Suspect Sobs in Court: ‘I Have no Money,’ Apr. 21, 2009, available at https://abcnews.go.com/Blotter/story?id=7386881&page=1, (last visited on May 11, 2009) [hereinafter Esposito et al.]. In April 2009, after the U.S. successfully rescued a hijacked American captain, and in the rescue operation killed several Somali pirates, the latter vowed to go after more American ships; a few days later, they attempted to hijack the Liberty Sun, a US ship, but were unsuccessful. CNN, New pirate attack thwarted in Gulf of Aden, Apr. 19, 2009, available at http://www.cnn.com/2009/WORLD/africa/04/19/pirate.attack.foiled/index.html?eref=rss_world (last visited on May 12, 2009) [hereinafter New pirate attack].
just as brash in their efforts to seize ships, steal money and capture hostages. Then, piracy would become a global issue, as it once was in the 16th and 17th centuries.13 This is a dangerous proposal that should be cut at its roots.

This Article argues that pirates should be treated as terrorists, and that piracy-fighting countries should rely on a variety of anti-terrorist conventions to justify the capture and prosecution of pirates either by the capturing state, or by a third state willing to accept captured pirates for prosecution in its domestic courts. Piracy resembles terrorism in many aspects, on both a theoretical as well as practical level, and reliance on anti-terrorist conventions by piracy-fighting countries will provide these countries with larger legal tools to battle pirates within an established international legal framework. In order to provide a comprehensive outlook on piracy, this Article in Part II describes the history of piracy, its origins, its Golden Age, its decline and its reappearance in the modern world. Part III briefly describes the resurgence of modern-day piracy, first in Southeast Asia and then in Somalia. Part IV provides the current international legal framework for battling piracy, by focusing first on the definition of piracy in international law, and then on the existing international legal authority to apprehend and prosecute pirates. Part V describes the existing options and solutions for fighting pirates, including domestic prosecutions, prosecutions in ad hoc tribunals, regional partnerships, as well as the aid of international maritime organizations. Part VI advocates for the need to fight piracy more aggressively; thus, this Part describes why pirates and terrorists are alike, and then argues that pirates should be fought and prosecuted like terrorists. Finally, Part VI also advocates for the need to rebuild Somalia and its institutions, as this is the only permanent, long-term solution to eradicate piracy in this region of the world. Before its final conclusion, this Article briefly addresses the potential criticism that its readers may express: that the fight against piracy may be entirely illusionary because maritime powers may not have any true incentive to combat pirates, based on a variety of financial, geopolitical, and strategic reasons. This Article recognizes such criticism, while supporting its own premise and arguments: that pirates (at least on a theoretical or academic level) need to be fought with full force. Thus, this Article concludes that serious efforts by piracy-fighting countries will be needed to resolve the piracy issue, and that above all, piracy-fighting countries may need to focus on rebuilding war-torn regions to prevent lawlessness, including piracy, from thriving in other parts of the world.

II Piracy: A Historical Perspective

Piracy has always existed. First descriptions of the practice exist in Homer’s The Iliad and The Odyssey, and in Greek mythology, piracy was considered a reputable profession.14 In the 1st century BC, piracy was viewed as a legitimate practice in the Mediterranean, because pirates supplied the Roman Empire with slaves for its luxury

13 See infra Part II.
markets. It wasn’t until pirates began disrupting vital trade routes to the East and to Africa that cities began to form alliances against pirates. The Roman Empire embraced the fights against piracy, and in 67 BC, a Roman commander, Pompey, was finally ordered to rid the Mediterranean of pirates. Because of the Roman fight against piracy, the definition of piracy can be traced back to the Roman Republic: Cicero dubbed pirates “hostis humani generi,” and contemporaneous laws drafted by Cicero and the Roman Senate construed piracy as both action against individuals and against the nation as a whole. Under Roman law, all crimes constituting piracy had to occur outside the municipal jurisdiction of any nation; the pirate was viewed as an enemy of the entire human race and could be prosecuted under municipal law after capture, but the right to prosecute was common to all nations. These early laws still form the foundation of international criminal law on piracy, and introduce the notion of universal jurisdiction over piracy. In fact, piracy is the first and foremost universal jurisdiction crime.

While piracy was viewed as a universal crime during the Roman era, the view on pirates changed later in time, and piracy reached its so-called Golden Age during the 16th and 17th centuries. The 16th century, the English Queen Elizabeth actually viewed pirates as adjuncts to the crown’s navy in its fight against Spanish trade. Piracy thus became a form of state-sponsored terrorism, and pirates themselves were considered “an ideal way to strike one’s enemy and hide the blade.” During the Elizabethan era, piracy was like modern-day terrorism: it contemplated the use of terror and force for a particular political end.

During the 17th century, with the end of the Spanish wars, the laws against pirates briefly returned. King James I undertook efforts to fight piracy; however, the king’s efforts yielded poor results as many pirates returned to their trade, and as many impoverished men turned to piracy. In fact, historians believe that men turned to piracy not only for monetary gain, but also because of “feelings of inferiority, rebelliousness against their low station in life, anarchical hatred, jealousy, revenge….Cast out from the fold, these men regarded piracy as a means of exacting personal vengeance on civilization itself.” Most pirates came from the lowest spheres of society, and seemed

16 Id.
17 Id.
21 Rubin, supra note 19, at 117-18.
22 Kontorovich, supra note 8.
23 Burgess, supra note 18, at 302-06 (describing the Golden Age of piracy).
25 Burgess, supra note 18, at 302-03.
26 Rubin, supra note 19, at 59.
28 Burgess, supra note 18, at 303.
29 Id. at 304.
to be motivated by both monetary and political aims. Pirates during the Golden Age saw themselves as rebels against the established societal order, “meting out ferocious revenge of a society that had wronged them from birth.”

Some pirate captains acted like modern-day terrorists: they had a reputation for barbarism and ferocity, they adopted a satanic appearance, and ruled as despots through terror. Pirates in this era, however, did not operate in a state of anarchy; rather, they had so-called “pirate articles,” which were codes of conduct adopted to organize and structure pirate ships like a naval unit. Thus, pirates were similar to terrorists in this respect also – they had their own organizational rules and punishments for disobedience, which all existed on a supra-national level. “Thus the pirate ship becomes a quasi-state unto itself, a legal anomaly which customary international law recognized by granting universal jurisdiction on its capture.”

Toward the late 17th century, with the end of many wars between the powerful naval nations (England, France, and Spain, inter alia), piracy suddenly stopped being a state-sponsored weapon, and pirates, instead of acting on behalf of certain states, turned against them. In response to this shift in piracy activities, laws of the naval nations changed and began to target pirates. In 1696, Sir Charles Hedges in England defined piracy as “sea-robbery,” and in 1700, the Piracy Act was passed, replacing jury trials of pirates with special commissions applying both civil and admiralty law. Thus, a fundamental shift occurred in the law from the Elizabethan era laissez-faire attitude toward piracy, to a view of piracy as a crime of universal jurisdiction in the early 18th century, just like in the Roman era. In 1721, an even more stringent Piracy Act was passed, bringing an end to the piracy Golden Age.

In the 18th and 19th centuries, piracy did not disappear however. “The pirates of the eighteenth and nineteenth centuries were no longer the flotsam of Europe’s mercantile
labor force, but tightly-woven bands of Eastern corsairs, succeeding generations of piratical clans sharing familial, tribal, ethnic, religious, or political identities. Their continued survival was assured by the Great Powers themselves, as Britain and France actively encouraged the corsairs to disrupt the other’s trade.”

However, although state-sponsored like in the Elizabethan era, piracy in the 18th and 19th centuries developed a different characteristic. Piracy became an act of savagery: if committed by English or French nationals belonging to civilized nations, it was viewed as treason, but if committed by “savages,” it was both permissible and politically useful. “By terming piracy an act of barbarity, the law was thus able to meld the competing doctrines of political utility and hostis humani generi.” This view of piracy led to a paradoxical situation, because the more the great powers employed pirates against each other, the more their laws drove the definition of piracy toward hostis humani generi. Finally, great powers arrived at the modern-day definition of piracy as a crime so heinous toward humanity in general, that pirates can be defined as enemies of humanity on the whole.

For example, the emerging United States navy scored a victory against the Barbary pirates in 1804, signaling that pirates would be viewed as an international threat. In 1856, the Declaration of Paris, signed by almost all imperial powers, abolished all forms of piracy, and pirates became subject to capture and trial where they were apprehended. Thus, states themselves recognized in 1856 their own shared guilt in supporting and enabling piracy during the previous centuries. The situation is somewhat analogous to the modern-day combat against terrorism: many states today have been blamed for training and supporting terrorist groups for their own political aims, and many such states have now vowed to fight terrorism. The Declaration of Paris and subsequent legislation created a separate legal entity for pirates, which weren’t viewed as either individuals or states. Rather, piracy was defined as a political tool beyond the scope of legitimate state behavior, and pirates themselves were not entitled to any form of citizenship protection. Pirates became defined as “as malevolent satellite to the law of nations, waging war upon them not only through his acts, but through his identity.” Toward the end of the 19th century, the abolition of piracy was solidified when even more nations, including the United States, repudiated it under the Hague Conventions of 1899 and 1907.

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39 Burgess, supra note 18, at 313.
40 Rubin, supra note 19, at 94; Burgess, supra note 18, at 313.
41 Burgess, supra note 18, at 313.
43 Burgess, supra note 18, at 313.
46 Perotin-Dumon, supra note 45, at 45.
47 Burgess, supra note 18, at 315.
48 Id.
49 Id. The Hague Conventions do not explicitly mention pirates, but they permit the capturing state to charge individuals, if they are not acting pursuant to state orders or schemes, under their domestic criminal law.
Thus, from the above described historical perspective of piracy, several points emerge linking piracy to modern-day terrorism (and justifying this Article’s argument, below, that pirates today should be fought just like terrorists). First, piracy, just like terrorism, embraces the use of terror by non-state actors as a means of coercion of states and their citizens.\textsuperscript{50} Second, piracy has historically been much more than sea-robbery. Piracy should be understood as a political tool of governments, by private individuals or groups whose actions are directed toward a particular political goal of the sponsoring state – pirate acts viewed in this light closely resemble terrorist acts.\textsuperscript{51} Third, pirate motivation throughout history has close resemblance with contemporary terrorist motivation. Pirates waged a war against the world which they viewed as unjust, and terrorists today similarly aim their acts against particular nations, in a war of non-state actors versus states.\textsuperscript{52} Finally, the legal definitions of piracy and terrorism have evolved and have come to resemble one another.\textsuperscript{53} Piracy is today seen less as sea robbery and more as maritime terrorism, as discussed below and as reflected in the modern-day treaties, like the Geneva Convention, UNCLOS, and SUA.\textsuperscript{54} “As the world has moved beyond the Cold War into a new century and new political realities, so too will piracy law adopt these realities within a new, unabashedly political, definition.”\textsuperscript{55}

III Modern-Day Piracy

Piracy was a hugely significant issue throughout the Middle Ages, as described above. In the 20\textsuperscript{th} century, however, it virtually disappeared, in order to resurface again in the late 1990’s and the beginning of the 21\textsuperscript{st} century, first in Southeast Asia, and later in Somalia.

A. Southeast Asia

In the mid-1990’s, piracy re-emerged as a potent maritime problem, affecting all nations, and thriving in specific waters and sea passages. In fact, driven by financial gains, modern-day pirates seem to target particular straits, where many ships pass and which shipping companies find hard to avoid because of geography, such as the Suez Canal, the Panama Canal, and the Strait of Malacca.\textsuperscript{56} Throughout the 1990’s and the early 2000’s, the Strait of Malacca in Southeast Asia saw an increase in pirate attacks, most likely because 30\% of the world’s annual commerce and 50\% of the world’s oil pass through this narrow body of water.\textsuperscript{57} For example, in 1996, armed pirates hijacked the Malaysian oil tanker Suci in Indonesian
waters; they captured the ship’s crew and later repainted the ship and changed its name.\textsuperscript{58} The crew members were ultimately released by the pirates, but the Suci has never been found.\textsuperscript{59} In 1999, a Japanese tanker, Alondra Rainbow, was attacked while sailing out of an Indonesian port; the crew was dumped onto a lifeboat, but the pirates retained the ship and its cargo.\textsuperscript{60} In 2001, the International Maritime Bureau (“IMB”), a branch of the International Chamber of Commerce specialized in maritime affairs and described below in this Article, reported 371 pirate attacks, and 370 in 2002.\textsuperscript{61} Similarly, the IMB documented 445 attacks in 2003 and 325 in 2004.\textsuperscript{62} While these numbers represent attacks throughout the world, many of them occurred off the coast of Southeast Asia.\textsuperscript{63} In fact, in 2006, Indonesian waters were considered the world’s most dangerous, with 50 pirate attacks.\textsuperscript{64}

Throughout the last decade, however, the Southeast Asian nations, and in particular, Indonesia, Malaysia, and Singapore, undertook significant effort to combat and reduce piracy off their shores.\textsuperscript{65} Such efforts yielded solid results, and piracy seems to have been drastically undermined in that area. Piracy however surged in the most recent years off the coast of Somalia, as described below.

\textbf{B. Somalia}

Somalia is poor and war-torn; it has not had a stable government since 1991.\textsuperscript{66} It is thus fertile ground for various forms of criminal activity, including, in the recent years, piracy.\textsuperscript{67}

Starting in 2007, the occurrence of pirate attacks intensified off the coast of Somalia, and particularly, in the Gulf of Aden, a strait between northern Somalia, the Horn of Africa and the Arabian Peninsula.\textsuperscript{68} In 2007 alone, piracy attacks increased by 200\%, and the first few months of 2009 saw dozens of piracy attacks not only in the Gulf of Aden, but also farther out in the Indian Ocean.\textsuperscript{69} In fact, because the Gulf of Aden is

\footnotesize{58} Helen Gibson, \textit{A Plague of Pirates: Modern Buccaneers with Machine Guns Instead of Cutlasses Are Once Again the Scourge of the Oceans}, TIME, Aug. 18, 1997, at 28.
\footnotesize{60} Peppetti, \textit{supra} note 15, at 108. It should be noted that in this instance, the Alondra Rainbow and the pirates that had hijacked the ship were ultimately captured by the Indian navy. \textit{Id.} at 109.
\footnotesize{62} \textit{Id.}
\footnotesize{63} \textit{Id.}
\footnotesize{64} Peppetti, \textit{supra} note 15, at 82.
\footnotesize{65} American Society of International Law, Annual Meeting, March 26, 2009, Piracy Off Somalia: the Challenges for International Law (author was in attendance) [hereinafter ASIL Meeting].
\footnotesize{66} Kontorovich, \textit{supra} note 8.
\footnotesize{67} See e.g., Jane G. Dalton, J. Ashley Roach, and John Daley, Introductory Note to United Nations Security Council Resolutions 1816, 1846 & 1851, Piracy and Armed Robbery at Sea (“[f]ueled by the violent political and economic instability in Somalia, the lack of a viable infrastructure to counter lawlessness, and the continued proliferation of ever-more-sophisticated small arms and light weapons… Piracy and armed robbery have increasingly endangered legitimate shipping in the waters off the coast of Somalia”).
\footnotesize{68} Kontorovich, \textit{supra} note 8.
\footnotesize{69} \textit{Id.}
heavily patrolled by navies from piracy-fighting countries, including the United States, pirates have moved their operations farther south to the Indian Ocean. The Somali pirates are currently holding close to 200 hostages, or crewmembers of a dozen ships.

The modus operandi seems simple: the Somali pirates sail out of Somali ports, equipped with potent weapons and fast ships in search of victims; they attack ships by firing at them, boarding them and overtaking their crew members. Recently, pirates have also begun to capture larger vessels, which they use as “mother ships,” and from which their tiny skiffs operate throughout hundreds of miles in the Indian Ocean. Most cargo ship crew members are not equipped with defensive weapons and not trained to fight pirates. In fact, shipping companies themselves instruct their personnel not to risk lives by engaging in fights with pirates. After ships are seized, the Somali pirates retreat back to Somali ports and coastal towns, where they enjoy complete impunity. Somalia does not have a stable central government that can adequately apprehend pirates. In fact, entire coastal towns in Somalia live off the proceeds of piracy: thus, pirates seem to drive the local economy and thus enjoy societal protection everywhere within their country. Poverty levels are high in Somalia, and statistics show that a single seizure of a ship can earn each individual pirate up to $150,000! Thus, pirates operate driven by financial needs and the promise of large sums of money quickly, with low risks of ever being caught. Shipping companies have routinely paid millions of dollars in ransom money to the Somali pirates; the pirates, in turn, have respected their promise not to harm hostages if ransom is paid and have in each instance released all hostages in good health.

Thus, modern-day piracy that has surged in Somalia seems to be driven by poverty, and fueled by the lack of government and criminal law enforcement mechanisms in Somalia. Moreover, until now, the lack of a strong international response to fight Somali piracy has also contributed to the proliferation of piracy acts in the Gulf of Aden and in the Indian Ocean. The tides may be turning on piracy, and we may witness a more unified and potent battle to eradicate Somali piracy, through a joint effort of naval powers. However, the fight against piracy on the whole will not be complete without a

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71 Id.

72 Pitman, supra note 9.

73 ASIL Meeting, supra note 65.

74 Id. (noting that hijacked ships are moored along the Somali coast).

75 Pitman, supra note 9 (noting that Somalia “disintegrated in 1991 when warlords toppled the president” and that since then, “it’s been ruled by heavily armed rival clans, hit by famine, and suffered relentless outbreaks of street-fighting that turned it into a no-go zone for most foreigners.”).

76 Id. (noting that pirates operate openly in several towns along the coast).


78 Kontorovich, supra note 8.

79 Houreld, supra note 70 (describing the “multi-million dollar ransoms” that shipping companies pay, which contribute to a “rare source of cash in Somalia.”).

80 Pitman, supra note 9 (indicating that pirates have rarely harmed hostages).

81 In the recent months, more nations have expressed their willingness to apprehend pirates. On April 15, 2009, the French navy captured 11 pirates, after launching an attack on the pirate ship, which the French
full re-examination, and possible elaboration, of international law, to define and sharpen the legal tools need to capture and prosecute both pirates themselves and the masterminds of piracy operations. Without such reliance on international law, piracy may surge in other areas of the world, where poverty and unstable governments persist. Thus, in the section succeeding below, this Article briefly outlines the current definition of piracy under international law, as well as the existing jurisdictional basis to capture and prosecute pirates.

IV Piracy and International Law

International law in its modern-day form defines piracy in several conventions; furthermore, in similar conventions it provides for specific basis under which countries may capture and prosecute pirates.

A. Definition of Piracy Under International Law

The first successful modern-day attempt to codify the law of piracy occurred in 1958, when eight articles addressing piracy directly were adopted in Geneva and included in the Convention on the High Seas (“Geneva Convention”). These articles were subsequently included in the 1982 United Nations Conference on the Law of the Sea (“UNCLOS”). UNCLOS, while not ratified by all countries, including the United States, nonetheless represents “the best evidence of international law relating to the maritime regime, and is therefore binding on all nations.”

Under UNCLOS, an act must satisfy four criteria in order to constitute piracy: 1) it must be committed on the high seas; 2) it must be of a violent nature; 3) it must include at least two vessels; and 4) it must be committed for solely private aims. This definition,
widely accepted as a reflection of customary law and recognized as the most authoritative codification of piracy law, significantly narrows the definition of piracy. First, any act, in order to qualify as piracy, must be committed on the high seas. This means that acts committed in the territorial waters of any state would not qualify as piracy, even though they include the violent seizure of a victim vessel by an aggressor vessel, for solely private aims, such as monetary gain or hostage taking. Acts referred to as “piracy” routinely committed in the early 2000’s in Southeast Asia, in the territorial waters of Singapore, Malaysia and Indonesia, were stricto sensu not piracy under the UNCLOS definition. Similarly, acts committed by the Somali pirates in the Somali territorial waters would not constitute piracy, simply because they take place in the wrong geographic zone. Second, any act that fulfills the legal requirements of piracy must involve two vessels: the victim vessel and the aggressor vessel. Thus, if pirates board the victim vessel on shore and overtake it during the victim vessel’s voyage on the high seas, such an act would not qualify as piracy because no aggressor vessel was involved. Thus, if the Somali pirates were to board a foreign ship in a port, posing as crew members, and to overtake the ship on the high seas, this act would not qualify as piracy. In the 1980’s, when members of a PLO faction overtook an Italian cruise ship, the Achille Lauro, the act did not constitute piracy under UNCLOS because the aggressors had boarded the ship in its last port; thus, no aggressor vessel was ever involved and the UNCLOS conditions were not satisfied. Third, if a piracy-like act is committed by a group with links to a specific state, the state action character of the act would defeat the purely private aims requirement of UNCLOS because of the alleged link between piracy and state action. Thus, with respect to the Achille Lauro incident, it was questionable whether the hijacking qualified as piracy because the hijackers had specific links to a state or a state-like entity (PLO).

The international maritime community, recognizing the need to expand the definition of modern-day piracy in order to encompass the acts like the Achille Lauro hijacking, drafted the Suppression of Unlawful Acts Against the Safety of Maritime Navigation Convention (“SUA”). The SUA Convention drafters, recognizing the narrow scope of the piracy definition under UNCLOS, attempted to come up with a broader definition of illegal violence at sea, which would capture acts such as the Achille Lauro hijacking. Under the SUA Convention, an act can qualify as “piracy” even though it is not committed on the high seas. Similarly, an act can qualify as “piracy” even though only

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any State.” UNCLOS, supra note 7, art. 101. Art. 15 of the 1958 Geneva Convention includes the same definition of piracy. Geneva Convention, supra note 82, Art. 15.
86 Peppetti, supra note 15, at 92.
87 Id. at 92-93.
88 ASIL Meeting, supra note 65.
89 Id.
90 For a detailed description of the Achille Lauro incident, see Dahlvang, supra note 61, at 25-27.
91 See Peppetti, supra note 15, at 92 (arguing that the “pirate ends” restriction has contributed to the most commonly adopted view that acts of violence committed for religious, ethnic or political reasons, such as acts of maritime terrorism, cannot be treated as piracy).
92 Dahlvang, supra note 61, at 26-27.
93 SUA Convention, supra note 7.
94 Dahlvang, supra note 61, at 22.
95 SUA Convention, supra note 7, Art. 4; see also Peppetti, supra note 15, at 94.
one vessel (the victim ship) may be involved. 96 The SUA Convention, however, does not use the term “piracy” at all 97 and is listed on the U.N. website as an anti-terrorist convention. Thus, it is questionable whether the SUA Convention actually alters the definition of piracy.

The SUA Convention, however, does solidify the link between piracy and terrorism, by treating piracy as a form of maritime terrorism and by equating the jurisdictional basis for the capture and prosecution of pirates with those that already exist in other anti-terrorist conventions for the capture and prosecution of terrorists. In fact, in response to recent acts of terrorism, the maritime industry attempted to strengthen SUA through amendments, known as the 2005 Protocols, which were adopted on Oct. 14, 2005, but haven’t as of today entered into force for lack of necessary state ratifications. 98 Thus, this Article argues below that piracy-fighting countries need to rely more heavily on conventions like SUA, and other anti-terrorism treaties, in order to justify their capture and prosecution of pirates, because pirates should be fought like terrorists.

**B. Jurisdiction to Capture Pirates**

Under international treaty law, as well as under customary law, any state has jurisdiction on the high seas to capture pirates. 99 Article 19 of the Geneva Convention, as well as Article 105 of UNCLOS, provide that:

“On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.”100

In fact, under the law of the seas, the high seas are viewed as no man’s land and jurisdiction to apprehend belongs to all nations.101 However, no nation has the right to enter a state’s territorial waters, where only the territorial state has exclusive jurisdiction to apprehend.102

The Somali pirates quickly took advantage of this situation in 2007, when they would attack ships in the Gulf of Aden and then quickly return to the Somali territorial waters,

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96 In fact, under SUA, any person who “seize or exercises control over a ship by force or threat thereof or any other form of intimidation” would violate the convention. SUA Convention, supra note 7, Art. 3.
97 Dahlvang, supra note 61, at 23 (noting that the SUA Convention does not refer to piracy by name).
99 Geneva Convention, supra note 82, Art. 19; UNCLOS, supra note 7, Art. 105; see also Dahlvang, supra note 61, at 22 (noting that on the high seas, every state may seize a pirate ship and arrest the pirates).
100 Geneva Convention, supra note 82, art. 19; UNCLOS, supra note 7, art. 105.
101 It was Hugo Grotius who developed the concept of “mare liberum” in the early 17th century and established the doctrine of freedom of the seas. Peppetti, supra note 15, at 106. Today, major international treaties codify the principle that anyone can apprehend pirates on the high seas, as the high seas do not belong to any particular nation. See, e.g., Art. 19 of the Geneva Convention as well as in Art. 105 of UNCLOS.
102 UNCLOS limits the territorial sea to 12 nautical miles off shore. UNCLOS, supra note 7, art. Note however that some nations, including China, have taken a nonconformist approach and have claimed that their exclusive economic zones, which typically extend out to 200 nautical miles, constitute territorial waters. Dahlvang, supra note 61, at 24. This approach significantly hinders the piracy fight under customary law, although arguably the 2008 U.N. Security Council Resolutions trump customary law and allow any nation to fight piracy in Somali territorial waters, whether such waters extend to 12 or 200 nautical miles.
where they were immune from persecution by nations patrolling the Gulf of Aden and trying to combat piracy.\textsuperscript{103} In order to address this unfortunate situation, the United Nations Security Council passed five different resolutions in 2008, authorizing any nation patrolling the Gulf of Aden to enter the Somali territorial waters and to use force against pirates.\textsuperscript{104} One of the five resolutions even authorizes nations to enter the Somali territorial waters if in “hot pursuit” of the pirates.\textsuperscript{105} Moreover, the December 16, 2008 Resolution extends the authorization to use military force against Somali pirates to land-based operations on the Somali mainland. Under this Resolution, nations can “undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea.”\textsuperscript{106} However, because the above Resolutions permit military action in Somali territory beyond that already authorized by customary law, many states with a history of piracy problems were apprehensive about the scope of such Resolutions, and feared that they would undermine national territorial sovereignty.\textsuperscript{107} Thus, the text accompanying the Resolutions emphasized that they applied purely to Somalia and that they would not establish any kind of a new precedent under international law.\textsuperscript{108} Moreover, all of the Resolutions require consent from the Somali transitional government before any of the patrolling nations attempts to enter the Somali territorial waters.\textsuperscript{109} Similarly, all of the resolutions require the patrolling nations to respect international humanitarian law when chasing pirates and entering the Somali territorial waters.\textsuperscript{110} The latter restriction is problematic: under international humanitarian law, pirates are considered civilians, which significantly limits the nature and type of force that can be used against them.\textsuperscript{111}

Under the SUA Convention, states have jurisdiction to apprehend and capture pirates anywhere, not just on the high seas.\textsuperscript{112} Thus, the SUA Convention gives states more freedom in their fight against piracy, like anti-terrorist conventions do for any state’s fight against terrorism. However, under SUA, a vessel must nonetheless be in international transit, coming from a foreign territory or the high seas, at the time of the illegal act.\textsuperscript{113} Thus, a vessel navigating through purely territorial waters of a state could

\textsuperscript{103} Kontorovich, supra note 8.
\textsuperscript{105} S.C. Res. 1851.
\textsuperscript{106} S.C. Res. 1816, Art. 6. The United States, the main proponent and drafter of Resolution 1816, had proposed language that would authorize operations in the Somali air space when combating piracy; this draft language was withdrawn when other Security Council nations objected. The United States however maintains that Resolution 1816 as is authorizes operations in the Somali air space. Agence France Press, \textit{US says piracy resolution allows for air strikes in Somalia}, Dec. 17, 2008, available at http://www.google.com/hostednews/afp/article/ALeqM5gD5FPXcnxXGFclrUHm3xXpenReDxQ (last visited on May 31, 2009).
\textsuperscript{107} Kontorovich, supra note 8.
\textsuperscript{108} Id.
\textsuperscript{109} Id..
\textsuperscript{110} See supra note 101.
\textsuperscript{111} Kontorovich, supra note 8 (noting that because pirates are treated like civilians under IHL, they may only be specifically targeted in immediate self-defense).
\textsuperscript{112} SUA Convention, supra note 7, Art. 4.
\textsuperscript{113} Id.
not be apprehended through SUA, and nations do not have a right of entry into another nation’s territorial waters to capture pirates under this convention.\textsuperscript{114}

As described in this section, international treaty and customary law provides for narrow basis under which pirates can be apprehended on the high seas or elsewhere. Recent United Nations Security Council Resolutions have further expanded such basis for the capture of Somali pirates, but unfortunately these resolutions only apply to Somalia and will not be useful in fighting piracy anywhere else in the world. Moreover, as will be described in the section succeeding below, jurisdiction to capture pirates under international law does not necessarily correspond to jurisdiction to prosecute them, which may pose additional hurdles in the global fight against piracy, and which may support this Article’s argument that piracy-fighting nations will need to treat pirates as terrorists and will need to rely on anti-terrorist laws.

C. Jurisdiction to Prosecute Pirates

Piracy is the original universal jurisdiction crime.\textsuperscript{115} Thus, under traditional customary law, piracy is viewed as a heinous crime against all nations and any state, acting as a global agent on behalf of all nations, can choose to prosecute the offending pirate.\textsuperscript{116} Treaty law and domestic laws, however, curtail the customary law conception of piracy.\textsuperscript{117}

Art. 19 of the Geneva Convention states that: “[t]he courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.”\textsuperscript{118} Art. 105 of UNCLOS repeats this provision, by specifically authorizing the capturing nation to prosecute pirates.\textsuperscript{119} Other states, however, are not entitled to prosecute pirates under the Geneva Convention or under UNCLOS. This is problematic for states like the United Kingdom that have chosen to transfer captured pirates to so-called regional partner states, like Kenya, for prosecution.\textsuperscript{120} Under UNCLOS, the legality of this type of transfer is dubious, as only the capturing state has jurisdiction over caught pirates, and receiving states, like Kenya, do not.\textsuperscript{121} Moreover, domestic statutes implementing UNCLOS do not always allow for universal jurisdiction. The U.S. statute that implemented UNCLOS allows the U.S. to prosecute pirates, although the U.S. is the capturing nation and has jurisdiction to prosecute under UNCLOS, only if pirates somehow acted against American interests.\textsuperscript{122}

\textsuperscript{114} Peppetti, \textit{supra} note 15, at 97.
\textsuperscript{116} Peppetti, \textit{supra} note 15, at 106.
\textsuperscript{117} Id. at 107 (noting that although the exercise of universal jurisdiction over pirates is permitted under treaty and customary law, any domestic prosecution on this basis must still be authorized under the prosecuting state’s national legal system, which is often not the case).
\textsuperscript{118} Geneva Convention, \textit{supra} note 82, Art. 19.
\textsuperscript{119} UNCLOS, \textit{supra} note 7, Art. 105.
\textsuperscript{120} See infra Part IV.C.
\textsuperscript{121} Kontorovich, \textit{supra} note 8.
\textsuperscript{122} In fact, the U.S. statute implementing SUA limits jurisdiction to the following cases: if the activity was on or against American ships; if the activity was by or against American nationals; if the offenders are later
Thus, if the United States captures pirates on the high seas, it may only prosecute them in
the United States if the pirates directed their activities against American ships or victims,
or if the pirates are somehow later found on American soil.123

Under the SUA Convention, states again have more freedom in terms of their
jurisdiction to prosecute pirates. Under this treaty, member states have an obligation to
extradite or prosecute persons accused of behavior that qualifies as piracy.124 Moreover,
SUA authorizes the capturing state to prosecute pirates, but it also condones transfers of
pirates to third states, even indicating that the third state “shall” accept such transferred
pirates.125 The SUA Convention conceptualizes piracy similarly to how anti-terrorist
conventions construe acts of terrorism, by allowing virtually any state to prosecute
captured pirates, like any state can prosecute captured terrorists. Thus, states like the
U.K. may rely on SUA to justify the legality of pirate transfers to regional partners like
Kenya.126 Moreover, piracy-fighting states should continue to justify the legality of their
anti-piracy measures, such as the prosecution of captured pirates, by emphasizing the
similarity between piracy and terrorism and by relying on other anti-terrorist conventions.
This Article outlines below the current possible responses to the piracy threat, including
the different prosecution options that either already exist or have been advocated as
solutions to this emerging crime.

V Possible Responses to the Current Piracy Threat

Several responses exist or have been suggested to fight piracy. Specifically, these
responses include the different prosecution options that exist over apprehended pirates,
thereby avoiding the situation where pirates are merely warded off or even released if
captured, as well as the existing international maritime organizations that, through various
efforts, aid the combat against piracy.

A. Domestic Prosecution

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123 Id.
124 SUA Convention, supra note 7, Art. 10 (“the state Party in the territory of which the offender or the
alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him, be obliged,
without exception whatsoever and whether or not the offence was committed in its territory, to submit the
case without delay to its competent authorities for the purpose of prosecution, through proceedings in
accordance with the law of that state. Those authorities shall take their decision in the same manner as in
the case of any other offense of grave nature under the law of that state.”). Note however that scholars have
argued that the obligation to prosecute “only imposes the requirement to hold a preliminary hearing, and
not to actually prosecute the alleged offender before an independent court of criminal justice.” Peppetti,
supra note 15, at 96.
125 See SUA Convention, supra note 7, Art. 6(4); see also Kontorovich, supra note 8.
126 Reliance on the SUA Convention is problematic, however, as most nations where pirate attacks typically
occur, including Indonesia, Malaysia, and Somalia, are not members of this convention. See Dahlvang,
supra note 61, at 23; see also Kontorovich, supra note 8.
The most likely response to the piracy threat involves prosecution of captured pirates in the domestic courts of the capturing state.\textsuperscript{127} Interestingly, this option has not been exercised much in the most recent examples of captured Somali pirates.\textsuperscript{128} For example, when North Atlantic Treaty Organization (“NATO”) forces rescued several fishermen from pirates in the Gulf of Aden in April 2009, they released the Somali pirates because they had no authority to arrest them.\textsuperscript{129} Moreover, when a Dutch ship operating as part of a NATO frigate captured several pirates in April 2009, the Dutch government announced quickly thereafter that it would release the pirates because their seizure was incorrect under Dutch law, as none of the pirates, victims, or the victim vessel was Dutch.\textsuperscript{130} Until this year, the U.K. and the U.S. preferred not to prosecute captured pirates, choosing to transfer them instead to a regional partner, Kenya, or to other states, for prosecution there.

The reasons why nations capturing pirates have been reluctant to prosecute them vary. First, although customary international law provides for universal jurisdiction over pirates, many domestic laws do not, allowing for domestic criminal prosecution of pirates only if they somehow threatened the prosecuting state’s national interests.\textsuperscript{131} Thus, the United States remained unwilling and unable under its domestic law to prosecute any Somali pirates until April of 2009, when a U.S. ship was attacked and an American captain held hostage.\textsuperscript{132} Once American interests were threatened, the U.S. became an available forum for the prosecution of Somali pirates.\textsuperscript{133} Similarly the French only chose to prosecute Somali pirates in France, for acts of piracy directed against a French luxury yacht.\textsuperscript{134} French law, similarly to American law, allows for prosecution of pirates under such circumstances, where French national interests were attacked.\textsuperscript{135} Second, nations that capture pirates may opt against prosecution because of the cost associated therewith. In fact, paying ransom to the pirates so that they release the ship they are holding and its crew may be a cheaper option than attempting to capture pirates and to bring them to the

\textsuperscript{127} One such example of domestic prosecution of pirates is the Alondra Rainbow incident described above in Part II. In that case, captured pirates were prosecuted in India, the capturing nation, in the country’s domestic courts, and received prison sentences of up to seven years. See, e.g., Peppetti, supra note 15, at 108-110 (describing the Alondra Rainbow incident and subsequent pirate prosecution in India).
\textsuperscript{129} Pitman and Houreld, supra note 128.
\textsuperscript{130} Id.
\textsuperscript{131} See supra, Part IV.C.
\textsuperscript{132} A U.S. cargo ship, Maersk Alabama, was hijacked in April 2009; the ship’s crew managed to fight off the pirates but its captain, Richard Phillips, was hijacked and held for several days as a hostage, before being rescued by a U.S. military effort. See Elizabeth A. Kennedy and Katharine Houreld, US ship reaches Kenya minus kidnapped captain, Apr. 11, 2009, available at http://news.yahoo.com/s/ap/20090411/ap_on_re_af/piracy (last visited on May 9, 2009); see also CNN, Pirates attack U.S. cargo ship but fail to get aboard, Apr. 14, 2005, available at http://www.cnn.com/2009/WORLD/africa/04/14/somalia.pirates.index (last visited on May 9, 2009).
\textsuperscript{133} In fact, the only captured hijacker of the U.S. captain, Richard Phillips, was brought to New York for trial. Pitman and Houreld, supra note 128.
\textsuperscript{135} Id.
capturing nation for prosecution.\footnote{136} For example, the U.S. recently captured a Somali pirate who was involved in the attack on an American ship in the Indian Ocean; the pirate was brought to New York for prosecution under American law.\footnote{137} The pirate’s prosecution and eventual detention, should he be convicted, will have cost the U.S. millions of dollars – an amount much higher than a single ransom payment demanded by the Somali pirates.\footnote{138} Thus, while prosecuting pirates domestically, in the courts of the capturing nation, may make sense in terms of deterrence, such prosecution is in fact a costlier (and more logistically difficult) option.\footnote{139} Third, some capturing nations may simply have very little incentive in seriously dealing with the piracy threat,\footnote{140} if they do not have a highly developed shipping industry or other strategic interests off the coast of Somalia. Finally, some capturing nations may simply want to avoid the hassle associated with prosecuting pirates, because of fear that piracy trials will be difficult, lengthy, expensive and burdensome on that nation’s judiciary.\footnote{141} Thus, some capturing nations have advocated for options other than domestic prosecutions in their own courts, such as the creation of an ad hoc piracy tribunal and the transfer of pirates to regional partners, like Kenya.

B. Ad Hoc Tribunals

In the recent years, several ad hoc tribunals have been created to deal with a variety of different criminal situations. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda have been established by the United Nations, to prosecute individuals responsible for the most heinous offenses committed during the civil wars in the former Yugoslavia and Rwanda.\footnote{142} The Special Court for Sierra Leone, the Iraqi High Courts, and the Extraordinary Chambers in the Courts of Cambodia are hybrid tribunals, created to bring individual accountability for the most serious offenses committed in Sierra Leone, Iraq and Cambodia, respectively.\footnote{143} Thus, some have suggested the creation of an ad hoc piracy tribunal, which would be situated in one of the nations neighboring Somalia, and which would prosecute all captured pirates, avoiding the hassle of domestic prosecution and situations where pirates are released for lack of better options.\footnote{144}

\footnote{136} ASIL Meeting, supra note 65.  
\footnote{138} ASIL Meeting, supra note 65.  
\footnote{139} Kontorovich, supra note 8, (“[h]owever, in practice, the nations patrolling the Gulf of Aden have chosen not to prosecute pirates because of the anticipated difficulty and expense.”).  
\footnote{140} See Peppetti, supra note 15, at 111 (noting that states may lack the willingness to prosecute pirates because of “the absence of a nexus to the crime” and because of a “shortage of the necessary security and law enforcement authorities.”).  
\footnote{141} ASIL Meeting, supra note 65.  
\footnote{142} Peppetti, supra note 15, at 143-44 (describing the existence of regional tribunals exercising universal jurisdiction, such as the ICTY and the ICTR).  
\footnote{143} See, e.g., Peppetti, supra note 15, at 148 (describing the establishment and structure of the Special Court for Sierra Leone); Scharf Course packet (describing the IHC and ECCC).  
\footnote{144} ASIL Meeting, supra note 65; see also Peppetti, supra note 15, at 148 (calling for the establishment of specialized regional tribunals vested with universal jurisdiction and thus the power to prosecute pirates).
While this option seems theoretically attractive, it is doubtful whether it has enough support with the key players, like the U.K. and the U.S., which have clearly indicated that they prefer to create regional partnerships and to have pirates prosecuted in domestic courts of such regional partners. It is also uncertain whether an ad hoc piracy tribunal will ever be created in light of the high expense associated therewith, and the difficult logistics that always accompany the creation of an ad hoc tribunal. An ad hoc piracy tribunal would need to find appropriate housing for its trial and detention facility; it would need welcome from at least one host country; it would need trained judiciary, prosecution and defense counsel, and it would need to develop a uniform piracy law that would be applied to all captured pirates. The difficulty of these tasks may outweigh the benefits of an ad hoc piracy tribunal, in light of the fact that some nations, like Kenya, may prove willing to prosecute pirates domestically.

C. Regional Partnerships

In 2008, the U.K. signed a Memorandum of Understanding with Kenya, whereby any captured pirates would be transferred to Kenya for prosecution in this country’s domestic courts under its criminal law. In practice, only one prosecution of Somali pirates took place in Kenya, in 2006, and the prosecuted pirates received seven-year prison sentences. Piracy fighting countries like the U.K. and the U.S. may hope to solidify the transfer mechanism and to potentially develop other regional partnerships; however, the legality of such transfers is dubious under international law.

First, the UNCLOS gives the capturing nation jurisdiction to prosecute pirates, but it does not vest such powers on third states. In fact, article 105 of UNCLOS provides that “every State may seize a pirate ship” on the high seas, but that the prosecution should take place in “the courts of the state which carried out the seizure.” Drafting history of UNCLOS confirms that this article was intended to preclude transfers to third states. Thus, although piracy fighting states may have the increased authority to take military action against the Somali pirates in light of the recent United Nations Security Council resolutions, such authority to apprehend pirates may not translate into a corresponding authority to prosecute. While it is true that the SUA Convention allows for the transfer of

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145 As described below, the U.K. has already signed an MOU with Kenya, whereby captured pirates would be transferred to Kenya for prosecution in the Kenyan domestic courts, see supra, Part IV.C.; see also Kontorovich, supra note 8, and the U.S. has also experimented with this idea by transferring captured pirates to Kenya in 2006, in a controlled test case. See supra Part V.A. Finally, when the U.S. captured one of the Somali hijackers who had held the American captain, Richard Phillips, in April 2009, there was some speculation as to whether the captured pirate would be tried in Kenya or brought to the U.S. for prosecution. Kennedy, Hijack Spree, supra note 81.

146 ASIL Meeting, supra note 65.

147 Kontorovich, supra note 8.

148 Peppetti, supra note 15, at 110. In this case, ten Somali pirates had attacked an Indian ship, the Safina Al Bisaarat. Five days later, a U.S. ship captured the pirates; this incident marked the first capture of pirates by an American navy ship in generations. See Peppetti, supra note 15, at 89-90. Eight days after the pirates were captured, the United States experimented with the U.K.-Kenyan MOU, by transferring a group of captured pirates to Kenya for prosecution in 2006 in a controlled test-case. However, such transfers have not turned yet into a regular procedure. Kontorovich, supra note 8.

149 UNCLOS, supra note 7, Art. 105.

150 Kontorovich, supra note 8, ASIL Meeting, supra note 65.
pirates to third-party states for criminal prosecution, Somalia, and many other countries, are not members of the SUA Convention and its utility may prove limited.\textsuperscript{151} Second, the capturing nation may be bound by various human rights conventions, like the International Covenant for Civil and Political Rights or the European Convention on Human Rights. In such a case, capturing nations have a non-refoulement obligation and may not transfer pirates to third states if there is a risk that pirates will be tortured in such third states or that they would not receive a fair trial.\textsuperscript{152}

Third, the law of the receiving state may complicate matters. In Kenya, for example, a domestic criminal procedure state mandates that any arrested person be brought before a magistrate within 24 hours of his or her arrest.\textsuperscript{153} In the case of pirates captured on the high seas, far off the Kenyan coast, this requirement may be difficult to satisfy, simply because the transfer of such pirates to Kenya may take several days. Also in Kenya, evidence law does not provide for the introduction of witness statements into evidence, calling instead for the production of witnesses themselves at trial.\textsuperscript{154} This requirement may also be difficult to satisfy, as witnesses to the pirate attack may live or be stationed far from Kenya and may not be available to assist with the Kenyan trial. Other pirate receiving states may not have adequate laws or procedures for the handling of difficult piracy trials.\textsuperscript{155} Thus, while regional partnerships represent an attractive option for the capturing state, such partnerships should be developed only after careful scrutiny of the receiving state’s criminal system and actual ability to handle piracy trials.

D. Maritime Organizations

The presence of international maritime organizations may aid the fight against piracy, by supplementing the above outlined prosecution options. The two main international maritime bodies involved in anti-piracy efforts include the International Maritime Organization (IMO) and the International Maritime Bureau (IMB).

“\textquote{The IMO is a specialized UN agency which is responsible for measures to improve the safety of international shipping and to prevent marine pollution from ships.}”\textsuperscript{156} The IMO is currently composed of about 165 states, 36 inter-governmental organizations, and 63 non-governmental organizations.\textsuperscript{157} The IMO administers several international agreements, some of which are aimed at combating piracy. The IMO also contributes to the fight against piracy by requiring ships to have specific IMO numbers visibly displayed on their hulls, which in turn prevents the use and resale of phantom ships (ships that are hijacked, and then later repainted and reused by pirates or

\textsuperscript{151} Kontorovich, \textit{supra} note 8.
\textsuperscript{152} Kontorovich, \textit{supra} note 8.
\textsuperscript{153} ASIL Meeting, \textit{supra} note 65.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} For example, the Alondra Rainbow prosecution, described above, was almost undermined because the Indian Penal code had no adequate provisions against piracy. Peppetti, \textit{supra} note 15, at 111.
\textsuperscript{156} Dahlvang, \textit{supra} note 61, at 34.
\textsuperscript{157} IMO, Membership, available at \url{http://www.imo.org/About/mainframe.asp?topicid=315} (last visited on May 6, 2009).
\textsuperscript{158} IMO, Convention, available at \url{http://www.imo.org/Conventions/contents.asp?header=false&topic_id=148&doc_id=637} (last visited on May 31, 2009). In fact, the IMO administers the International Convention for the Safety of Life at Sea. \textit{Id.}
Moreover, the IMO has helped to raise security requirement for ships in ports, by enacting new stricter regulations for port safety. Finally, the IMO manages routing schemes for international shipping; these schemes can help to prevent piracy by rerouting smaller vessels from pirate-infested waters or by providing security to all ships sailing through such dangerous waters.

The IMB, in turn, is a branch of the International Chamber of Commerce, and has established a Piracy Reporting Centre in Malaysia, in 1992. The Centre collects piracy reports and broadcasts them to ships at sea; thus, coast guards learn about piracy incidents quickly. Moreover, the Centre has been involved in locating hijacked ships and has made significant achievement in such efforts.

The two above international maritime organizations contribute to the fight against piracy through the spreading of valuable information. “IMB statistics are the primary source of information regarding maritime piracy, and analysis of these reports has resulted in specific recommendations for preventing pirate attacks…The collection and distribution of information about such piracy movements and efforts remains crucial in continuing the fight against piracy.”

All of the above described mechanisms in combating piracy, however, may not be enough. This Article advocates below for the need for more aggressive measures in fighting Somali piracy; such aggressive measures may then be transplanted to any other region of the world where piracy may develop and thrive next. In particular, this Article argues that pirates should be equated with terrorists and fought like terrorists, with reliance on anti-terrorist measures, laws, regulations and conventions.

VI The Need for More Aggressive Measures in Fighting Somali Piracy

Pirates can be successfully fought in Somalia if two conditions are met. First, pirates should be captured and prosecuted routinely and treated like terrorists: anti-terrorist laws should help piracy-fighting countries to overcome legal hurdles currently posed by existing international law on piracy. Second, piracy in Somalia will thrive as long as lawlessness prevails in this war-torn region. Thus, the true solution to fighting piracy in Somalia will constitute of a rebuilding of a stable society in Somalia.

A. Piracy as Terrorism

164 Dahlvang, supra note 61, at 37.
165 Id.
Pirates could be more effectively prosecuted if they were treated as terrorists. In fact, if pirates were treated as terrorist, a variety of anti-terrorist conventions could become available as basis for their criminal prosecution, such as SUA, the Convention for the Suppression of Unlawful Seizure of Aircrafts, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the International Convention against the Taking of Hostages, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, and the International Convention for the Suppression of Terrorist Bombings. These anti-terrorist conventions could either be relied upon directly, should the piracy act fit within the precise framework of one of these conventions, or simply as jurisdictional and procedural models for the handling of piracy captures and trials. Piracy, as this Article argues, constitutes terrorism on the high seas, and pirates should be treated as terrorists.

While it seems unlikely at the present time that the proceeds of Somali piracy fund any particular terrorist activity, the link between piracy and terrorism in general is real. For example, pirate ships routinely seize weapons from victim vessels, and may be involved in the resale and smuggling of such weapons to terrorist groups. For example, in 2002, the Israeli Navy seized a vessel carrying a significant amount of weapons intended for the Palestinian Authority. A series of alike incidents allegedly involved al-Qaeda, and it has been reported that Osama bin Laden himself has access to at least twenty sea vessels. Moreover, explosives used to attack the U.S. Embassies in Africa in 1998, and the nightclubs in Bali in 2002 were all apparently smuggled in on such ships. It is very difficult to fight pirates smuggling weapons on a state level: their ships routinely fly so-called flags-of-convenience, their ships may be registered through another state’s shipping company; and the pirates themselves may come from a variety of different countries. Thus, weapon smuggling pirates should be fought on an international level, exactly like terrorists, and should be prosecuted on the basis of anti-terrorist international conventions.

Moreover, piracy often exists in support of terrorism and serves to fund terrorist groups. While no link between piracy and the funding of terrorism has been detected in Somalia as of now, such a link has certainly existed in the recent past. In August 2003, an oil tanker sailing through the Straits of Malacca was hijacked by pirates, who

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166 See infra note.
167 While there haven’t been any conclusive reports that Somali piracy is fueling terrorism, U.S. officials believe that al-Qaida has operatives in Somalia. Pitman, supra note 9.
170 The fact that ships tied to terrorism fly flags-of-convenience is problematic because states providing such flags have no control over the vessels, and because some such states are actually land-locked and have little incentive to contribute to any anti-terrorism or anti-piracy efforts. Dahlvang, supra note 61, at 31.
171 Dahlvang, supra note 61, at 32.
demanded a significant ransom amount in return for the release of hijacked hostages. The IMB strongly believed that this attack was linked to Indonesia Aceh rebels trying to fund their rebel movement. In the Philippines, a terrorist group called Abu Sayyaf has regularly kidnapped foreigners and demanded multimillion dollar ransoms. At other times, pirates have gone after ships carrying valuable cargo; this in turn suggests that pirates may be paying off port and government officials, who supply them with ships’ manifests, detailing the ships’ cargo, and who then suppress investigations into the captured ships and cargo. Thus, pirates are able to sell the ships and cargo seized for handsome profit, which in turn may fund specific terrorist activity or group.

On a purely theoretical level, pirates and terrorists differ in one aspect: the latter seem to function on the basis of a particular political or religious ideology, while the former, at least in Somalia, seem purely driven by financial gains. Pirates and terrorists however proffer many similarities. First, both piracy and terrorism are a form of organized crime, with powerful masterminds and entire rings of executioners. In terms of fighting piracy and terrorism, going after the executioners may not do enough and instead, one may have to focus on the masterminds. Thus, when going after the Somali pirates, countries like the U.K. and the U.S. need to be able to go after the masterminds – the Somali warlords hiding behind the lawlessness of mainland Somalia. Customary international law does not provide capturing nations with the authority to enter Somalia’s territory to arrest piracy masterminds, and while some of the 2008 U.N. S.C. resolutions go as far as to authorize capturing nations to enter Somali territorial waters and the Somali land, this option has not been exercise yet by any piracy fighting nation. Some anti-terrorist conventions, however, would authorize capturing nations to enter Somalia in pursuit of the operation masterminds, improving the limited legal tools that are available to nations fighting piracy. Second, both piracy and terrorism exist on a supra-national level: their

175 Abbu Sayyaf is an Islamist separatist movement linked to al-Qaeda, as well as another organization responsible for the 2002 Bali attacks. David E. Kaplan et al., The Shadow over the Summit, U.S. NEWS & WORLD REPORT, Oct. 20, 2003, at 29.
176 Dahlvang, supra note 61, at 32.
177 See supra note and accompanying text.

executioners function privately, beyond the sponsorship of any particular state, and their
targets come from a variety of different states. The Somali pirates have gone after ships
of many different nationalities so far, and the taken hostages have come from myriad
different countries.\footnote{See e.g., Kontorovich, \textit{supra} note 8 (noting that “pirates make no discrimination among vessels” and that “[a]nything is fair game”).} Terrorists, similarly, have operated against many different nations
and have harmed nationals of many different states. In fighting pirates, similarly to
fighting terrorist, nations may have to come together, to form coalitions, and to rely on
international law for tools that will provide them jurisdiction to go after and try captured
pirates. Third, both terrorists and pirates seem to thrive in lawless regions: recently,
terrorists have found safe haven in the remote mountains of Afghanistan and Pakistan,
and pirates have flourished in war-torn Somalia. When dealing with the piracy problem,
similarly to fighting terrorism, countries may need to rely on international law to find
authority to conduct air or land-based military initiatives against pirates/terrorists.

Thus, because fighting pirates parallels fighting terrorists, countries need to be able to
treat pirates exactly as terrorists, in order to widen their range of available legal, military
and political strategies. One of such strategies involves relying on anti-terrorist
conventions, like SUA to find justification for the apprehension of pirates on Somali land
or for the prosecution of pirates in Kenya or other regional partners.

\textbf{B. Rebuilding Somalia and its Institutions}

Finally, piracy will thrive in Somalia as long as lawlessness and poverty prevail in
this war-torn country.\footnote{Vice Admiral William Gortney, commander of U.S. Naval Forces Central Command and the Combined
Maritime Forces, recently stated that “[p]iracy around the world stems from activity where there is
lawlessness, lack of governance, economic instability; things of that nature. And wherever you have that,
you’re going to have criminal activity at sea.” Pentagon looks to move battle, \textit{supra} note.} Piracy exists in Somalia because many people are poor and
cannot find adequate employment to support their families. Piracy also exists in Somalia
because there is no central government that could fight pirates: the country has had no
government, no organized army or police force, and no functioning judiciary for almost
two decades.\footnote{Pitman, \textit{supra} note 9.} In such a cowboy climate, pirates are able to freely dock their ships in
Somali ports, and to escort their hostages onto Somali land, without any fear of arrest or
other repercussions by the Somali government.\footnote{Many analysts have already argued that piracy cannot be fought off the coast of Somalia by security
alone, and the deputy commander of the U.S. Africa Command in Germany has recently stated that the
only long-term solution would be to resole the political instability in Somalia. Callimachi, \textit{supra} note 77. Similarly, Mary Yates, a senior U.S. diplomat serving as Africom deputy for civil-military activities, has
recently stated that “[w]e have to get at the root causes, and the root causes are on the land.” \textit{Id.}} Thus, fighting piracy off the coast of
Somalia may require the rebuilding of Somalia.\footnote{Pitman, \textit{Ending Somali Piracy}, \textit{supra} note 9(arguing that pirates operate openly in towns along the coast
of Somalia).} Countries that have felt threatened by piracy may need to lobby the U.N. for funds and support in rebuilding the political

_Guide_EN/s2/13-AX03_EN_v2.pdf+anti-terrorist+conventions&cd=1&hl=en&ct=clnk&gl=us (last
visited on June 8, 2009).}
institutions and infrastructure of Somalia, and may need to invest their own time and
effort and recreating a stable and peaceful Somali society. Otherwise, pirates will
continue to thrive.\textsuperscript{185} Already, piracy is developing off the coast of Nigeria, another
relatively unstable country.\textsuperscript{186} Piracy may similarly spread to other unstable regions, and
we may face a return of the 17th century paradigm: wherever there is water, pirates thrive.
Ensuring peace and stability in Somalia, and possibly in other regions, may be the most
significant and comprehensive step in fighting piracy.

C. Cautionary Note: Is the Fight Against Piracy Purely Illusionary?

Despite the possible responses to the piracy threat in Somalia and elsewhere, outlined
above, and the more aggressive measures needed in the same fight, advocated above, I
admit that the scope of this Article may have more academic than practical value. I
firmly believe that pirates are dangerous and that world powers like the United States
should use more aggressive means in combating sea terrorists. Thus, in my Article, I
present what I believe to be the most ideal response to the piracy threat, while describing
why I believe so and attempting to persuade others to share my view. However, in
reality, I recognize that my view may have little practical appeal for countries facing the
piracy issue, for a variety of pragmatic, geo-political, financial and strategic reasons.

First, fighting pirates on a serious military level, as advocated above, is incredibly
costly. The United States, the United Kingdom, or any other maritime force attempting
to aggressively wage a war on piracy in Somalia or elsewhere would have to increase its
naval presence in the affected zone. To that end, piracy fighting countries would have to
deploy more ships in piracy infested seas, to equip such ships with appropriate weapons
and pirate tracking devices, as well as to risk marine and soldier lives by instructing them
to engage in combat against the pirates. Such efforts carry an enormous price tag,
especially as compared to the low effort and cost attached to the paying of ransoms.
Thus, from a financial standpoint, fighting pirates may not be attractive and countries
may just continue to pay multi-million dollar ransoms, as long as pirates keep releasing
hostages without any violence. Second, piracy always thrives in lawless regions, like
Somalia. As I advocate above, eradicating piracy may entail the rebuilding of stable
societies and the reestablishment of order, so that pirates no longer enjoy the immunity of
chaotic, unstable, government-less areas. World powers like the United States may
simply not be willing or able to help every troubled zone in the world. The United States
already projects an image of a world savior and has the highest number of humanitarian
troops deployed around the globe; thus, it may simply not have enough man power or
political willingness to engage in every single lawless region. The true piracy eradicating
solution (the rebuilding of stable societies) may not be a feasible goal. Finally, from a
purely opportunistic standpoint, countries like the United States or the United Kingdom
may not have enough strategic incentive to go after pirates, as long as American or
British ships are not often attacked, and as long as American or British interests are not
more directly threatened. For example, were it firmly proven that pirates harbored

\textsuperscript{185} Pitman, \textit{supra} note 9 (arguing that because the developed countries, including the U.S., have not
undertaken significant efforts to help Somalia rebuild itself, now its “anarchy… has come back to haunt.”).
\textsuperscript{186} See, e.g., Piracy in Nigeria, \textit{available at} http://en.wikipedia.org/wiki/Piracy_in_Nigeria (last visited on
May 31, 2009).
dangerous terrorists or directly aided groups like Al Qaeda, the United States and the United Kindgom would surely rethink their strategy and their efforts against pirates. Until such times, naval powers may continue to employ meager efforts in the fight against piracy, and consequently, piracy may continue to thrive, uninterrupted and unhindered.

Because I firmly believe in the dangers associated with piracy, I will continue to advocate my view in academic forums, in maybe illusionary hopes of catching a political eye and attracting more concrete support. As I stated above in the beginning of this Article, pirates are sea terrorists and should be fought with full force.

VII Conclusion

Modern-day piracy, currently thriving in Somalia and possibly spreading to other regions of the world, is a serious threat to all naval nations, to their ships and crew members, as well as to their cargo. Pirates today operate like terrorists: they go after any prey that they estimate easy to capture, irregardless of the nationality of the ship or its crew members. Thus, they function in a supra-state sphere, as a global threat to all nations and a lingering menace on all seas. Moreover, a serious danger looms that pirates may become linked to other terrorist groups, or that their activities will fund such other terrorist groups. All countries, and especially those with a significant naval presence, should undertake serious efforts to fight piracy in Somalia, and to ensure that piracy doesn’t reemerge in another lawless region. Pirates need to be fought in a serious manner: by being routinely captured and routinely prosecuted and punished in the courts of piracy-fighting states. In order to accomplish these goals, piracy-fighting countries should equate piracy with terrorism, should rely on anti-terrorist conventions as a legal basis for the battle against piracy, and should continue to cooperate in their struggle against the Somali, and other, pirates. Finally, piracy-fighting countries may need to undertake additional efforts to rebuild Somalia and to ensure that such lawlessness does not occur in other regions of the world. In fact, piracy, exactly like terrorism, thrives in government-less states, war-torn regions, and impoverished areas. Thus, the best long-term solution against piracy may be the developed world’s commitment to reestablish functioning order in the developing and failed states, like Somalia.