

2011

The Somali Piracy Problem: A Global Puzzle Necessitating A Global Solution

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Recommended Citation

Sterio, Milena. "The Somali Piracy Problem: A Global Puzzle Necessitating A Global Solution." *American University Law Review* 59, no.5 (June 2010): 1499-1497.

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The Somali Piracy Problem: A Global Puzzle Necessitating A Global Solution

Abstract

Over the past few years, piracy has exploded off the coast of Somalia. The Somali pirates congregate on a mother ship and then divide into smaller groups that sail out on tiny skiffs. Using potent weapons like AK-47's and hand-propelled grenades, the Somali pirates then attack civilian ships carrying cargo through the Gulf of Aden, toward South Africa or Asia. Once they have overtaken the victim vessel, pirates typically hijack the vessel's cargo and crewmembers. The former is often resold to willing buyers (some of which include terrorist organizations like Al Qaeda). The latter are taken to the Somali shore and kept hostage, until multi-million dollar ransoms are paid by either the hostages' home country or the ship owners themselves. In most instances, crew members have been released unharmed, but those held hostage by the Somali pirates describe a horrific ordeal, and specify that they were held at gun point during most of their captivity. The pirates themselves routinely go unpunished: once they release the hostages, they simply return to their ships to plan yet another lucrative capture.

The reasons for such a high success rate for the Somali pirates are relatively simple. First, the Somali pirates operate for the most part in the Gulf of Aden, a narrow strait of water where thousands of ships sail every year; thus, the number of potential victim vessels is higher in these waters than elsewhere. Second, because these pirates operate in such a narrow body of water, they are able to haul captured cargo and victims quickly and easily onto the Somali mainland. Thus, pirates do not have to risk capture by sailing for long stretches of time on open seas with the hijacked cargo and crewmembers on their own ships, which would be the case if they operated elsewhere. Third, Somalia is a failed state with no central government and no effective police force; thus, pirates are able to operate with impunity from Somali coastal towns. In fact, news accounts confirm that entire towns on the coast of Somalia happily live off the proceeds of piracy. Fourth, piracy is a lucrative business: reports indicate that a single seizure of a ship can earn each individual pirate up to \$150,000! In a country like Somalia, where average yearly earnings amount to about \$600, this amount seems more than staggering. Finally, piracy in Somalia has been thriving because of a lack of global cooperation in suppressing pirate attacks. Pirates work at a supra-national level: they attack a vessel owned by a company headquartered in country A, which flies the flag of country B and employs crewmembers coming from countries C, D, E, and F. Thus, no particular country's interests are harmed through the pirate attack. Moreover, crewmembers typically come from the developing world, and the major maritime powers like the United States and the United Kingdom have shown relatively little interest in working toward the release of pirate-held non-native hostages. The lack of global cooperation in terms of law enforcement as well as prosecution of the detained pirates has significantly contributed to the high success rate of the Somali pirates. Shipping companies themselves, despite being the most affected by pirate attacks, have done nothing to solve the problem. Instead, through paying increasingly high ransoms to the pirates in exchange for the release of kidnapped crewmembers, shipping companies have exacerbated the problem.

This Article argues that the true solution to the Somali piracy problem consists of a globally coordinated effort among major maritime powers, regional countries, and shipping companies themselves to share information, to jointly collect data, to cooperate in maritime patrols and surveillance operations off the Somali coast, to establish jurisdictional networks to ensure that pirates are always prosecuted, and to provide for stiff penalties for apprehended pirates. If Somali piracy continues to thrive, it could dangerously undermine East African regional stability, contribute to the rise of terrorism, further endanger the financial stability of the shipping business, and impose burdensome human and monetary costs on all the parties involved, including major

maritime countries like the United States or the United Kingdom. Because of the potential global danger that the Somali piracy poses, any responses thereto must be of a global scale. In order to further address this important issue, this Article describes in Part II why fighting piracy is crucial in today's volatile world. Part III outlines the existing laws available in the fight against piracy, including domestic criminal statute as well as major international treaties. Part IV describes some of the already existing practical responses to the piracy problem, focusing on the successful solutions that littoral states in Southeast Asia adopted when faced with the rise in piracy incidents in the Malacca Straits. Finally, Part V presents both legal as well as practical solutions, based on the Southeast Asian model, which could be adopted for the resolution of the Somali piracy crisis. This Article concludes that the Somali piracy will continue to thrive unless a true global network of law enforcement and jurisdictional efforts by all the relevant players is established and applied to this region.

Keywords

maritime piracy, law of the seas, economics, international law, international humanitarian law

THE SOMALI PIRACY PROBLEM: A GLOBAL PUZZLE NECESSITATING A GLOBAL SOLUTION

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INTRODUCTION

Over the past few years, piracy has exploded off the coast of Somalia. Somali pirates congregate on a “mother ship” and then divide into smaller groups that sail out on tiny skiffs.¹ Using potent weapons such as AK-47s and hand-propelled grenades,² Somali pirates attack civilian ships carrying cargo through the Gulf of Aden, a body of water between Yemen and Somalia.³ Once they have overtaken the victim vessel, the pirates typically hijack the vessel’s cargo and kidnap the crewmembers.⁴ The cargo is often resold to willing buyers or held for ransom.⁵ The crew are kept hostage in Somalia until either the hostages’ home country or the shipowners pay, at times, multi-million dollar ransoms.⁶ In most instances, crewmembers are released unharmed,⁷ but those held hostage have described a horrific ordeal.⁸ The pirates themselves routinely go unpunished: once they release the hostages, the pirates simply plan yet another lucrative capture.

The reasons why Somali pirates have a high success rate are relatively simple. First, Somali pirates operate mostly in the Gulf of

1. Todd Pitman, *Ending Somali Piracy: Few Options for US Forces*, ABC NEWS, Apr. 14, 2009, <http://abcnews.go.com/International/wireStory?id=7337114>.

2. *Suspected Pirates Rescued in Gulf of Aden*, CNN.COM, Dec. 5, 2008, <http://www.cnn.com/2008/WORLD/africa/12/04/yemen.pirates/index.html>.

3. *Id.* The Gulf of Aden is a major international shipping route linking the Red Sea and the Arabian Sea. *Id.*

4. See generally Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, ASIL INSIGHTS, Feb. 6, 2009, <http://www.asil.org/insights090206.cfm> (describing the pirates’ typical operational style and goals).

5. *Id.*

6. See Vivienne Walt, *Why the Somali Pirates Keep Getting Their Ransoms*, TIME, Apr. 20, 2009, <http://www.time.com/time/world/article/0,8599,1892366,00.html> (indicating that container ships and tankers can command ransoms upwards of two million dollars).

7. Pitman, *supra* note 1.

8. See, e.g., Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT’L L. 1, 3 (2007) (describing the experience of a hijacked ship’s crew with Somali pirates); Margaret Ryan, *Captain Counts the Cost of Piracy*, BBC NEWS, Feb. 2, 2006, <http://news.bbc.co.uk/2/hi/africa/4669050.stm> (describing an incident where pirates set a ship’s crew adrift at sea with few rations, and the crew was forced to drink their own urine to survive).

Aden, a major global shipping route,⁹ where the number of potential targets is higher than elsewhere. Second, Somali pirates are able to use the region's geography to their advantage. Somalia has the longest coastline in Africa, making it difficult to patrol, and it is populated by coastal towns where pirates easily blend in with other insurgent groups.¹⁰ Because the Gulf of Aden is a relatively narrow body of water, pirates are also able to bring smaller ships to land fairly quickly, which allows them to secure the crew and cargo while they wait for ransom.¹¹ Third, Somalia is a failed state with a weak, unstable central government and no effective police force; thus, pirates are able to operate with impunity from Somali coastal towns.¹² In fact, news accounts suggest that entire towns on the coast of Somalia happily live off the proceeds of piracy.¹³ Fourth, piracy is a lucrative business: reports indicate that a single seizure of a ship can earn each individual pirate up to \$150,000.¹⁴ In Somalia, where yearly earnings average about \$600, this amount is staggering to Somali youth who see few other employment options.¹⁵

Finally, piracy in Somalia is thriving because of a lack of global cooperation in suppressing pirate attacks. Pirates work at a supranational level: they attack a vessel owned by a company headquartered in country A, which flies the flag of country B, and employs crewmembers coming from countries C, D, E, and F.¹⁶ Thus, no single country's interests are harmed through the pirate attack.

9. James Kraska & Brian Wilson, *Fighting Pirates: The Pen and the Sword*, 25 *WORLD POL'Y J.* 41, 41 (noting that 20,000 ships pass through the Gulf of Aden annually and that their cargos include twelve percent of the world's daily oil supply).

10. Pitman, *supra* note 1.

11. *Id.*; see also Kontorovich, *supra* note 4.

12. Kraska & Wilson, *supra* note 9, at 52; *Death Toll Rises as Violence Rocks Somali Capital*, CNN.COM, Mar. 11, 2010, <http://www.cnn.com/2010/WORLD/africa/03/11/somalia.fighting/index.html?iref=allsearch> [hereinafter *Death Toll Rises*] (remarking that Somalia has not had a stable government since 1991 and describing the ongoing fighting between government and rebel forces); Pitman, *supra* note 1.

13. See Mohamed Ahmed, *Pirate Stock Exchange Helps Fund Hijackings*, FIN. POST (Canada), Dec. 1, 2009, <http://www.financialpost.com/news-sectors/story.html?id=2289558> (describing how the pirates have set up "maritime companies" in some coastal villages). In the exchange towns, local Somalis can invest in the piracy industry by contributing money, weapons, or other materials to the pirates. *Id.* The investor then receives a share of the ransom money from successful pirate ventures. *Id.*

14. Kontorovich, *supra* note 4.

15. Rukmini Callimachi, *Seychelles Coast Guard Arrests 9 Suspected Pirates*, ABC NEWS, Apr. 28, 2009, <http://abcnews.go.com/International/wirestory?id=7446902&page=2>.

16. See *infra* note 272 and accompanying text (discussing flags-of-convenience and their effect on antipiracy efforts).

Moreover, many crewmembers come from the developing world,¹⁷ and major maritime powers such as the United States and the United Kingdom have shown relatively little interest in ransoming pirate-held hostages.¹⁸ The lack of global cooperation of law enforcement with regard to Somali piracy, combined with the failure to prosecute detained pirates, has significantly contributed to Somali pirates' high success rates. Even shipping companies, despite being the entities most directly affected by pirate attacks, have done little to solve the issue. Instead, shipping companies have exacerbated the problem of Somali piracy by paying increasingly high ransoms in exchange for the release of hijacked ships, cargo, and kidnapped crewmembers.¹⁹

This Article argues that the true solution to the Somali piracy problem consists of a globally coordinated effort involving major maritime powers, countries in the regions affected by piracy, and shipping companies. This effort would encourage parties to share information and jointly collect data, cooperate in maritime patrols and surveillance operations off the Somali coast, establish jurisdictional networks that ensure pirates are always prosecuted, and provide stiff penalties for apprehended pirates. Part I of this Article describes why fighting piracy is crucial in today's volatile world. It argues that if Somali piracy continues to thrive, it could dangerously undermine East African regional stability, contribute to the rise of terrorism, further endanger the financial stability of the shipping industry, and impose burdensome human and monetary costs on a global scale. Even major maritime countries like the United States or the United Kingdom could be seriously affected by unchecked piracy in Somalia. Part II outlines the existing legal resources available to fight piracy, including domestic criminal statutes and major international treaties. Part III describes how other regions have addressed the problem of modern piracy, focusing on the successful solutions adopted by the littoral states in Southeast Asia when piracy incidents increased in the Malacca Straits. Finally, Part IV presents

17. See, e.g., *14 Reasons: Why Ship Owners Prefer Filipino Seafarers and How They Exploit Them*, MARINEBUZZ.COM, Oct. 30, 2008, <http://www.marinebuzz.com/2008/10/30/14-reasons-why-ship-owners-prefer-filipino-seafarers-and-how-they-exploit-them/> [hereinafter *14 Reasons*] (describing why many shipping companies hire crews out of the Philippines).

18. See Walt, *supra* note 6 (noting that governments usually do not pay ransoms to pirates because (1) shipping or insurance companies will instead; and (2) paying ransoms would undermine their anti-pirate military strategies).

19. James W. Carbin, *Pirates: Hostis Humanis Generis*, 56 FED. L. 50, 55 (2009) (concluding that shipping companies' practice of paying ransoms encourages the continuance of piracy).

both legal and practical solutions based on the Southeast Asian model that could be adopted to resolve the Somali piracy crisis. This Article concludes that, because of the potential global threat that Somali piracy poses, any response must be global in scope, with all affected parties—private and governmental—working both to improve security and law enforcement in the affected area and to resolve jurisdictional conflicts that inhibit efforts to bring pirates to justice.

I. PRELUDE: WHY FIGHTING SOMALI PIRACY IS IMPORTANT

According to Captain Pottengal Mukundan, Director of the International Maritime Bureau (IMB), piracy in the Gulf of Aden is “out of control.”²⁰ In 2008, Somali pirates took nearly 600 crewmembers hostage; several hundred of these crewmembers, as well as a dozen ships, are still being held by the pirates, who may demand millions of dollars in ransom for their release.²¹ Somali pirates have become more aggressive in their operations, recently beginning to attack larger ships. In 2008, they seized the *Faina*, which was carrying Russian tanks and ammunition, as well as the supertanker *Sirius Star*, which was carrying two million barrels of oil.²²

Section I.A will discuss how, if left unchecked, Somali piracy, in the long-term, could eventually lead to the decline of commercial activity and commercial centers in East Africa.²³ Section I.B will show how Somali piracy imposes significant costs on shipping companies that are already financially stressed, deterring maritime commerce, endangering sea lines of transportation and communication, and undermining regional stability.²⁴

In 2008, the United Nations Security Council, recognizing the seriousness of the threat posed by Somali piracy, passed Resolution 1816, which states that piracy “exacerbate[s] the situation in Somalia[,] which continues to constitute a threat to international peace and security in the region.”²⁵ Section I.C will discuss how piracy can both contribute to the formation of maritime terrorism

20. Kraska & Wilson, *supra* note 9, at 42.

21. *Id.*

22. James Kraska & Brian Wilson, *Piracy Repression, Partnering and the Law*, 40 J. MAR. L. & COM. 43, 43 (2009); *see also* Walt, *supra* note 6 (noting that pirates have become increasingly skilled at hijacking and that kidnap experts were stunned at the seizure of the *Sirius Star*, whose side had been regarded as too high for pirates to scale).

23. Kraska & Wilson, *supra* note 9, at 43.

24. *Id.* at 42–43.

25. S.C. Res. 1816, ¶ 13, U.N. Doc. S/RES/1816 (June 2, 2008).

and provide funding and other assistance to terrorist causes, aiding groups such as al-Qaida. This section will also demonstrate how allowing pirates to pursue their activities without resistance sends a strong lack-of-deterrence message to other potential sea and land-based terrorists, who may infer that their efforts will remain unchecked for many years as well.

A. *Piracy and the Failed Somali State: A Threat to Global Peace*

Somalia is a failed state.²⁶ Since the early 1990s, Somalia has not had a stable government, and its fragile government is currently battling warlords and militant Islamic groups for control of the country.²⁷ The country does not have a functional economy, and its official law enforcement operations are slim, with gangs of paramilitary groups and rebel forces controlling the streets of Mogadishu and other towns.²⁸ Piracy has thrived in this cowboy culture of inefficient government, and everyday life is ruled by violence.²⁹ A functional Somali government is so absent that some Somali coastal towns have established pirate-centric societies where piracy not only enjoys local support, but local governments rely on it.³⁰ If nothing is done to thwart the rise of piracy in Somalia, piracy will not only continue to prosper in Somalia, undermining efforts to stabilize the country, but also seriously threaten regional and international peace and stability.³¹

Piracy can spread elsewhere from Somalia. Other African states, whether Somali neighbors or located farther away, could fall prey to

26. See *id.* at 52.

27. Kontorovich, *supra* note 4 (noting that Somalia has not had a stable government since 1991 and lacks the capacity to keep its territorial waters secure); see also Jane G. Dalton et al., *Introductory Note to United Nations Security Council: Piracy and Armed Robbery at Sea—Resolutions 1816, 1846 & 1851*, 48 INT'L LEGAL MATTERS 129, 129 (2009) (attributing the rise in piracy in Somalia to “violent political and economic instability, . . . the lack of a viable infrastructure to counter lawlessness, and the continued proliferation of ever-more-sophisticated small arms and light weapons”); *Death Toll Rises*, *supra* note 12 (describing ongoing conflicts between the government and a militant Islamic group, al-Shabaab).

28. See Ahmed, *supra* note 13 (describing the government’s lack of control over the country and the economic difficulties faced by Somalians); Bahar, *supra* note 8, at 19 (noting that Somalia has no formal maritime defense forces and no effective government).

29. Dalton et al., *supra* note 27, at 129.

30. Ahmed, *supra* note 13 (quoting a local Somali government official who stated that “[p]iracy-related business is the main profitable economic activity in our area and as locals we depend on their output”). The official described how local districts are given a percentage of the pirates’ ransom, which they then use to improve infrastructure, such as hospitals and schools. *Id.*

31. See *infra* Part I.C (discussing the link between piracy and terrorism).

powerful pirate operations, especially if such operations become firmly rooted in Somalia and ruled by powerful warlords enjoying Somali government support. Regional pirate networks could be created, posing a significant threat to global commerce and human safety.³² Moreover, piracy can endanger commercial and tourist routes, undermining the regional economy and exposing neighboring states to all sorts of potential problems.³³ Potential problems include economic non-viability, political and civil unrest caused by poverty, and border instability provoked by the need to expend vast resources on the fight against piracy. In addition, Somali piracy can threaten global peace and security if pirates start collaborating with other maritime trafficking groups, such as those who smuggle narcotics or weapons of mass destruction, either for a financial or political cause. Thus, the development of Somali piracy could contribute to the spread of maritime violence, endangering sea routes everywhere and supporting dangerous factions across the globe.³⁴ As discussed below, the Somali pirates could become linked to powerful terrorist organizations and could significantly contribute to the development and growth of such groups. These global implications, highlighted below, show why a present-day global response is needed to curb and eventually eliminate this menace.

B. *The Economic Costs of Piracy*

As pirate attacks increased over the last few years in the Gulf of Aden and elsewhere off the Somali coast, so did shipping companies' cargo transportation costs for any ships sailing in these treacherous waters. Estimates indicate that shipping companies may be losing between thirteen and fifteen billion dollars per year due to pirate attacks.³⁵ To minimize the risk of ships falling prey to Somali pirates, shipping companies have devoted significant attention to shipping routes. In order to avoid the most dangerous places, routes have

32. Kraska & Wilson, *supra* note 22, at 43 (arguing that piracy could contribute to regional instability in East Africa).

33. *Id.* ("Beyond the immediate threat to crews, property, and ships, maritime piracy endangers sea lines of communication, interferes with freedom of navigation and the free flow of commerce, and undermines regional stability.").

34. Reports indicate that Somali pirates have broadened the geographical scope of their operations from the Gulf of Aden, close to the Somali shore, to Seychelles, farther out in the Indian Ocean. Callimachi, *supra* note 15.

35. Kraska & Wilson, *supra* note 9, at 43.

sometimes been recalculated and lengthened, thus requiring more fuel and more paid days at sea for crewmembers.³⁶

Moreover, because of the increased risk of pirate attacks off the Somali coast, insurance premiums have soared: whereas shippers previously paid as little as \$500 per voyage, they now face rates as high as \$20,000 for vessels passing through the pirate-infested waters.³⁷ Shipping companies' labor costs have also increased. In light of the dangers of the pirate-infested Gulf of Aden, shippers have needed to increase crewmembers' salaries to entice them to serve on vessels deployed through these waters.³⁸ Even with higher salaries, some crewmembers may simply be unwilling to expose their own lives to the dangers posed by piracy.³⁹ Thus, recruiting for shipping companies may become a difficult exercise, requiring additional efforts and expenses.⁴⁰

Finally, in addition to increasing costs on the front-end of the shipping process, piracy has driven up costs in other ways. In some cases, pirates have demanded multi-million dollar ransoms after successfully hijacking a ship and kidnapping its crewmembers, and the shipping companies have met those demands in almost every instance by paying large sums of cash to the pirates.⁴¹ These pirate-imposed costs have substantially increased shipping companies'

36. *Id.* at 42 (indicating that rerouting ships to avoid the Suez Canal and instead sail around the Cape of Good Hope would add an additional two weeks to the sea voyage, increasing the cost of shipping and the time of transit significantly).

37. *Id.* at 43.

38. Reports indicate that some crewmembers are asking for double pay when sailing through pirate-infested waters. *The Price of Piracy on Shipping*, MARKETPLACE, Apr. 10, 2009, http://marketplace.publicradio.org/display/web/2009/04/10/pm_piracy; see also *14 Reasons*, *supra* note 17 (remarking that shipowners compensate many Filipino crewmembers with double pay for the risk of sailing through the Gulf of Aden).

39. Dan Horlock, *Outlook '09: Chemical Shipping Faces Stormy Waters*, ICIS.COM, Jan. 7, 2009, <http://www.icis.com/Articles/2009/01/07/9182084/outlook-09-chemical-shipping-faces-stormy-waters.html> (discussing how piracy has exacerbated the pre-existing problem of qualified crew shortages in certain areas of the shipping industry).

40. Baird Maritime, *InterManager: Criminalisation and Piracy Damage Seafarer Recruitment*, Mar. 22, 2010, http://www.bairdmaritime.com/index.php?option=com_content&view=article&id=6004:intermanager-criminalisation-and-piracy-damage-seafarer-recruitment&catid=113:ports-and-shipping&Itemid=208.

41. Carbin, *supra* note 19, at 54 (speculating that ransoms paid to date will soon reach the amount of \$50 million dollars). One reason the pirates have been so successful at obtaining large ransom payments is that the pirates have been careful not to damage hijacked vessels and cargo or to injure hostages so that they can use these assets as leverage. *Id.*

expenses and could cause significant long-term economic problems in the shipping industry if piracy in Somalia is not addressed.⁴²

The financial problems that Somali pirates have brought upon shipping companies are particularly relevant in light of the ongoing global financial crisis.⁴³ According to one recent analysis, “[i]nstability from maritime piracy in the Gulf of Aden is sending ripples throughout the global supply chain, which is already reeling from the collapse of shipping rates brought on by the worldwide economic slowdown.”⁴⁴ As the economic crisis has peaked, consumption has declined, demand for merchandise and raw materials has dropped, and fewer ships are needed to transport goods. The result has been a decrease in shipping prices and lower profits for shipping companies.⁴⁵ Moreover, shipping companies’ abilities to borrow money and work closely with large lenders may have been negatively affected by the banking crisis.⁴⁶ A significant decline in existing cash flows coupled with the need to expend large sums of cash to pay pirate ransoms may wreak havoc on shipping companies’ finances and may threaten their long-term financial stability. In addition, the financial strain of increasing global fuel costs is exacerbated by the need to purchase additional fuel to avoid pirate-infested shipping routes.⁴⁷ Finally, if shipping companies are forced to incur additional expenses to equip their ships with security officers, weapons, pirate-tracking devices, and other technological mechanisms to combat pirates, their financial future and well-being in today’s volatile economy may become uncertain.

42. Kraska & Wilson, *supra* note 22, at 46 (explaining that, in addition to pirate-imposed costs and safety concerns, the shipping industry also faces unpredictable fuel costs, skyrocketing insurance premiums, decreasing freight rates, and increasing safety concerns for crew and cargo).

43. Kraska & Wilson, *supra* note 9, at 41.

44. *Id.*

45. See Thomas Shulz, *That Sinking Feeling: Global Crisis Hits Shipping Industry Hard*, SPIEGEL ONLINE, Dec. 5, 2008, <http://www.spiegel.de/international/business/0,1518,594710,00.html>.

46. *Id.* (describing how banks’ reluctance to issue loans and letters of credit is impacting shipping companies); Alexander Jung et al., *The Container Crisis: Shipping Industry Fights for Survival*, SPIEGEL ONLINE, Aug. 11, 2009, <http://www.spiegel.de/international/business/0,1518,641513,00.html> (noting that the shipping industry declined by sixteen percent in six months).

47. Kraska & Wilson, *supra* note 9, at 43.

C. *Piracy as Terrorism: The "Piratization of Terrorism"*⁴⁸

Some modern-day pirates, including some operating in Somalia, are more akin to sea-terrorists than sea-robbers. While contemporary pirate activity, like medieval piracy, may be fueled partially by the prospect of significant financial gain, some modern pirates resort to violence because of political and ideological goals.⁴⁹

1. *Pirates' political aims*

During the 1990s and early 2000s, when piracy was thriving in the Malacca Straits of Southeast Asia, reports indicated that pirates operated off an Indonesian island where the Aceh separatist group was fighting for autonomy and independence from Indonesia.⁵⁰ Some pirates were members of Aceh, while others received support from Aceh. It is widely believed that piracy proceeds fueled the Aceh separatist movement by providing the group with the funds necessary to purchase weapons, train military groups, and engage in violent secessionist combat.⁵¹ Southeast Asia is also home to other violent Islamic groups, such as the Jemaah Islamiya and the Mumpulan Mujahideen in Malaysia; the Moro National Liberation Front, the Moro Islamic Liberation Front, and Abu Sayyaf in the Philippines; and Laskar Jihad in Indonesia.⁵² Some of these groups have considered launching attacks against vessels in the Strait of Malacca.⁵³ Others have already launched attacks: the Indonesian Aceh rebels hijacked an oil tanker in 2003; Abu Sayyaf has abducted foreigners from resorts by boat, transporting them to the Philippines where they then demand multi-million dollar ransoms; and ethnic Malay groups have become increasingly interested in learning hijacking techniques.⁵⁴ In sum, IMB has reported the emergence of a "new brand of piracy" in Southeast Asia, one where attacks are motivated by overarching political goals and where ransoms are used to finance

48. I respectfully borrow the term "piratization of terrorism" from Michael Bahar. See Bahar, *supra* note 8, at 28.

49. Erik Barrios, Note, *Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia*, 28 B.C. INT'L & COMP. L. REV. 149, 151 (2005).

50. Bahar, *supra* note 8, at 29 (describing how the Free Aceh Movement in Indonesia has been linked to maritime terrorism).

51. See *Id.* (describing pirate attacks committed by the Free Aceh Movement in the Strait of Malacca between 2002 and 2003); see also *Aceh Rebels Blamed for Piracy*, BBC, Sept. 8, 2003, <http://news.bbc.co.uk/2/hi/asia-pacific/3090136.stm>.

52. *Id.*

53. *Id.*

54. Niclas Dahlvang, *Thieves, Robbers, & Terrorists: Piracy in the 21st Century*, 4 REGENT J. INT'L L. 17, 33-34 (2006).

politically related terrorist activity rather than to provide personal financial gain.⁵⁵

There is also some concern that terrorist groups could engage in pirate-like hijackings to carry out terror attacks. One author notes:

Actual attacks by terrorists have thus far been limited to temporary seizures of vessels and crewmen, but officials express concern over the ease with which large vessels such as oil tankers could be hijacked and used as weapons with which to block commercial waterways or attack one of Southeast Asia's numerous busy harbors. In addition to direct attacks, terrorists may also exploit the region's maritime shipping activity to facilitate their operations in other parts of the world. For example, authorities suspect that terrorist groups have been using container ships to smuggle weapons, supplies, and even the terrorists themselves.⁵⁶

Somalia provides fertile ground for piracy and terrorism to merge.

2. *Somali piracy and terrorism*

The "piratization of terrorism," which is already a significant worry in Southeast Asia, could easily spread to Somalia, where Osama bin Laden is believed to have militant training bases, and where militant factions linked to al-Qaida operate freely.⁵⁷ Terrorism already has a foothold in the country; for example, authorities believe that a militant Islamist rebel group carried out a recent terrorist attack that left twenty-three people dead at a medical school graduation in Mogadishu, the capital of Somalia.⁵⁸ This type of violence exemplifies Somalia's volatility, vulnerability to militant Islamic groups, and the ability of terrorist groups to function with impunity. Similarly, pirates have been able to operate without repercussions. If not kept in check, Somali pirates could forge allegiances with terrorist groups interested in attacking in Somalia or elsewhere in the world.

Outside Somalia, some modern-day pirate organizations are akin to sea-terrorists because they have direct ties to terrorist groups.⁵⁹ Pirates have smuggled weapons and delivered them to terrorist

55. Barrios, *supra* note 49, at 151.

56. *Id.* (citations omitted).

57. Bahar, *supra* note 8, at 28; *Death Toll Rises*, *supra* note 13 (linking a local militant Islamic group, al-Shabaab, to al-Qaida).

58. *Somalia Graduation Ceremony Blast Kills 23*, CNN.COM, Dec. 4, 2009, <http://www.cnn.com/2009/WORLD/africa/12/04/somalia.attacks/index.html> (reporting that the attack was attributed to al-Shabaab).

59. *See, e.g.*, Dahlvang, *supra* note 54, at 18 (arguing that the profits realized by piracy may subsidize terrorism).

groups⁶⁰ and have financially contributed to such groups.⁶¹ Modern pirates are not sympathetic Robin Hoods of the sea; rather, they are maritime terrorists linked to powerful groups like al-Qaida and the Aceh, engaged in a form of sea aggression to terrorize shippers and governments.⁶² Al-Qaida, for example, has used vessels filled with explosives to attack ships from major maritime powers, such as the United States and France.⁶³ Osama bin Laden, who allegedly owns or controls almost twenty freighters known as the “al Qaeda Navy,” has shown how terrorists can utilize the seas: a bin Laden-controlled merchant ship delivered the explosives that were used to bomb American embassies in Kenya and Tanzania in 1998.⁶⁴

Modern pirates are also similar to terrorists because they function on a highly organized scale at a supranational level. The Southeast Asian pirates have not confined their attacks to ships from their countries of residence; rather, they have targeted cargo ships from a variety of nations, taken hostage nationals of many different states, and demanded ransom from all of these governments.⁶⁵ Similarly, Somali pirates have engaged in indiscriminate attacks against a variety of nations’ ships, likewise taking hostages from numerous countries and demanding ransoms from their governments.⁶⁶ Moreover, modern pirates function in a hierarchical, organized fashion. Reports on Somali piracy indicate that their operations are managed by powerful warlords who live in impunity on the Somali mainland; the attacks are executed by young men who are recruited from the poverty-stricken streets in coastal villages and towns.⁶⁷ Similarly, powerful leaders, like Osama bin Laden, lead terrorist organizations, often hiding in lawless regions or geographically

60. *Id.* at 31–32 (describing how terrorist organizations use ships flying flags-of-convenience to transport weapons and explosives, some of which have been linked to terrorist attacks such as the Bali nightclub bombings of 2002).

61. *Id.* at 31–34 (detailing instances of pirate attacks linked to terrorist groups and pointing out that piracy can be used to fund terrorism).

62. Dahlvang, *supra* note 54, at 31–32, 34 (describing Osama bin Laden’s “navy” and a 2003 oil tanker hijacking linked to Aceh).

63. See George D. Gabel, Jr., *Smoother Seas Ahead: The Draft Guidelines as an International Solution to Modern-Day Piracy*, 81 TUL. L. REV. 1433, 1437–38 (2007) (describing al-Qaida attacks on a U.S. ship in 2000 and on a French ship in 2002).

64. *Id.* at 1438.

65. See, e.g., Dahlvang, *supra* note 54, at 31–34 (detailing instances of pirate attacks in Southeast Asia against ships coming from different nations).

66. Bahar, *supra* note 8, at 36.

67. When ten suspected Somali pirates were apprehended after the attack on the *Safina al Bisrat* in 2006, it was discovered that they did not know their birthdays, their parents, or how to read and write, and some were very young. *Id.* at 41; see also Ahmed, *supra* note 13 (providing a specific example of how Somalia’s impoverished state drove a young man to piracy).

inhospitable areas, while terrorist attacks are virtually always executed by young men recruited by the terrorist group in a systematic, carefully planned manner.⁶⁸ In addition, both modern-day pirates and terrorist groups may bribe government officials to gain valuable information, which they use to prepare attacks.⁶⁹

3. *Piracy as terrorism in international conventions*

Some scholars support the view that the United Nations Convention on the Law of the Sea (UNCLOS), negotiated in 1982, embraces acts commonly considered terrorism as piracy.⁷⁰ UNCLOS defines piracy as a violent act committed “for private aims.”⁷¹ Other scholars argue that this provision simply excludes state-sponsored piracy from the convention and does not eliminate acts committed for a political purpose (such as the acts of a terrorist group) from qualifying as piracy.⁷² In other words, just because terrorists have some political goals, their actions also consist of at least some private ends that would bring maritime terrorists within the definition of piracy under UNCLOS.⁷³ Moreover, as long as maritime terrorists attack indiscriminately against several states, they remain *hostis humani generi* and should be treated as pirates under UNCLOS.⁷⁴ Although many scholars contend that acts of terrorism do not qualify as piracy under UNCLOS because they are not committed for private but rather for political aims, recent scholarly support exists for the

68. See generally Thomas M. Sanderson, *Transnational Terror and Organized Crime: Blurring the Lines*, 24 SAIS REV. 49 (2004) (analyzing the relationship between organized crime and terrorism).

69. See Scott Baldauf, *Who are Somalia's Pirates?*, CHRISTIAN SCIENCE MONITOR, Nov. 20, 2008 <http://www.csmonitor.com/World/Africa/2008/1120/p25s22-woaf.html> (discussing how corrupt government officials aid Somali pirates); David M. Luna, Dir. for Anticrime Programs, Bureau of Int'l Narcotics and Law Enforcement Affairs, Remarks at APEC Anticorruption Meeting (Feb. 26, 2009) (discussing how corruption contributes to the success of international criminal organizations).

70. See United Nations Convention on the Law of the Sea art. 101, Oct. 7, 1982, 1833 U.N.T.S. 41–42 [hereinafter UNCLOS] (including “acts of violence” and “detention” in the definition of piracy); Bahar, *supra* note 8, at 34–37 (demonstrating through analysis of various acts of terrorism on vessels that the private ends sought by the terrorists do not prevent these acts from being classified and prosecuted as piracy).

71. UNCLOS, *supra* note 70; see also *infra* Part II.B (discussing the private aims requirement under UNCLOS).

72. See Bahar, *supra* note 8, at 28–35 (arguing that as long as terrorists are not direct state actors and they strike in international waters, they should be viewed as pirates, regardless of their subjective intent).

73. *Id.* at 33.

74. *Id.*

alternative proposition—that maritime terrorism represents a form of piracy under UNCLOS.⁷⁵

The Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention)—negotiated in 1988 in direct response to a maritime hijacking of an Italian cruise ship by members of a Palestinian Liberation Organization (PLO) faction—is an anti-terrorist convention listed as such on the United Nations website and drafted as such for jurisdictional purposes.⁷⁶ The PLO attack epitomized the concept of piracy as maritime terrorism after the United States decried the act as piracy.⁷⁷ The SUA Convention solidifies the idea of universal jurisdiction by authorizing any nation to pursue an attacking vessel, as long as the vessel is in some form of international transit, and to prosecute offenders.⁷⁸ Finally, the SUA Convention, although applicable to most modern-day incidents of piracy, does not speak directly of piracy. Rather, it simply outlaws several different types of maritime aggression, for example: hijacking a ship, taking crew members or passengers hostage, or planting explosives on a ship.⁷⁹ The SUA Convention illustrates the modern-day approach to piracy and the need to broaden its definition to encompass maritime aggression and terrorism, as opposed to confining its definition to the out-dated scope of sea-robbery.

75. For the traditional view that UNCLOS excludes acts of terrorism from its definition of piracy, see Barrios, *supra* note 49, at 156; Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 TUL. MAR. L.J. 257, 274 (2002); Zou Keyuan, *Implementing the United Nations Convention on the Law of the Sea in East Asia: Issues and Trends*, 9 SING. Y.B. INT'L L. 37, 44 (2005). For the modern view that UNCLOS does not exclude acts of terrorism from its definition of piracy, see Bahar, *supra* note 8, at 27–28; Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention of Maritime Safety*, 82 AM. J. INT'L L. 269, 282 (1988).

76. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 3, Mar. 10, 1988, 1678 U.N.T.S. 221 [hereinafter SUA Convention] (defining the “offense” as a number of different acts that could be terrorism or piracy, and not limiting the offense to the customary definition of piracy); Malvina Halberstam, *Benjamin N. Cardozo School of Law*, Comments at the American Society of International Law Annual Meeting (Mar. 26, 2009) [hereinafter ASIL Meeting] (describing the events leading up to the passage of the SUA Convention and how the SUA Convention addressed the antiterrorism concerns posed by the *Achille Lauro* incident).

77. Bahar, *supra* note 8, at 27–28.

78. SUA Convention, *supra* note 76, art. 3.

79. *Id.*

D. Piracy and Deterrence

Piracy is a serious criminal activity. Pirates are criminal offenders subject to universal jurisdiction;⁸⁰ from a deterrence standpoint, not fighting them sends the wrong message to pirates and other criminal and terrorist organizations. This is particularly true if pirates are routinely released after capture, or if only a few of those captured are prosecuted. While deterrence is essential in the fight against piracy, it is difficult to judge how efficacious prosecutions would be to deter the spread of Somali piracy. Young men living in poverty on the Somali coast may not be deterred at all by the possibility of facing legal consequences when considering whether to become a pirate. For poor Somali youth, the prospect of earning thousands of dollars may outweigh the unlikely possibility of being caught and tried.⁸¹ While deterrence alone may not solve the Somali pirate problem, it remains an important part of the solution.

Deterrence of Somali pirates through criminal prosecutions remains important for several reasons. From a local Somali standpoint, if prospective pirates believe the chances of capture and prosecution significantly outweigh the probability of profit, then there is a possibility that more recruits would be dissuaded from engaging in this criminal activity.⁸² Moreover, if international criminals such as pirates are not routinely prosecuted and punished, other potential criminals, such as weapons-smugglers and narco-traffickers, may think that hard-to-prosecute crimes routinely go unpunished and that they may flout international law with impunity.⁸³ This may lead to an overall increase in international crime. Thus, pirates should be fought, captured, and routinely prosecuted because the whole world has an interest in deterring international crimes.

II. EXISTING LAWS AVAILABLE TO FIGHT PIRACY

While the previous section showed why prosecuting pirates is necessary, this section will argue that the fight against piracy needs to

80. UNCLOS, *supra* note 70, art. 101.

81. *See* Bahar, *supra* note 8, at 41 (illustrating the dire circumstances under which the Somali pirates have matured).

82. *See id.* (arguing that the perceived probability of capture will likely have a deterrent effect on the Somali pirates).

83. *See* MICHAEL BRAUN, WASH. INSTITUTE FOR NEAR E. POLICY, COUNTERING TRANSNATIONAL THREATS: TERRORISM, NARCO-TRAFFICKING, AND WMD PROLIFERATION (POLICY FOCUS NO. 92) 27, 27–29 (Mathew Levitt & Michael Jacobson eds., 2009) (highlighting the symbiotic relationship between terrorism and terrorist organizations and narco-trafficking and arms dealing).

be grounded in the law: states active in fighting pirates and interested in prosecuting them in domestic courts need to rely on domestic and international laws in order to justify antipiracy operations.⁸⁴ The section below outlines the domestic antipiracy laws of some of the most important countries in the global piracy fight, as well as the most important international laws and regulations applicable to piracy.

A. *Domestic Laws*

The United States has a long history of punishing acts of piracy, but in some respects it has failed to modernize its piracy law. The U.S. Constitution defines piracy as an act that occurs on the high seas.⁸⁵ Article 1, Section 8 of the Constitution grants Congress the power “[t]o define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations.”⁸⁶ Congress, pursuant to such direct constitutional authority, enacted 18 U.S.C. § 1651, which provides that “[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”⁸⁷ The U.S. Supreme Court has further expounded the definition of piracy, specifying that an act can come within the scope of piracy even though the actors did not intend to plunder, or did not engage in plunder.⁸⁸ According to the Supreme Court, if someone “sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief,” the act may qualify as piracy, like an act of robbery on the high seas.⁸⁹ In the United States, however, maritime law fails to address modern-day issues of piracy, such as when acts are committed for a political end or in support of terrorism.⁹⁰

In the Marine Insurance Act of 1906, Great Britain defined pirates as “passengers who mutiny and rioters who attack the ship from the shore.”⁹¹ Prior to this, British common law viewed piracy as acts of depredation and robbery committed on the high seas, which, if

84. See Bahar, *supra* note 8, at 40–43.

85. U.S. CONST. art. 1, § 8, cl. 10.

86. *Id.*

87. 18 U.S.C. § 1651 (2006); *see also id.* §§ 1652–1653 (prescribing life sentences for pirates who are aliens and United States citizens); 33 U.S.C. §§ 381–384 (2006) (authorizing the use of private and public vessels to combat and seize pirate ships).

88. *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844).

89. *Id.*

90. Gabel, *supra* note 63, at 1444.

91. Marine Insurance Act, 1906, 6 Edw. 7, c. 41, § 30, sched. 1, ¶ 8.

committed on land, would have amounted to a felony.⁹² Kenya, a regional partner in the fight against Somali piracy, adapted its law from British common law and has already tried some of the captured Somali pirates.⁹³ Kenya defined a pirate as “[a]ny person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium*.”⁹⁴

Southeast Asian countries have also struggled with finding a suitable definition of the act of piracy. The Philippines, an important partner in the fight against Southeast Asian piracy, defines the activity as “[a]ny attack upon a seizure of any vessel, or the taking away of the whole or part thereof . . . by means of violence against or intimidation of persons or force upon things, committed by any person, including a passenger or member of the complement of said vessel, in Philippine waters.”⁹⁵ Malaysia, another country battling Southeast Asian piracy, defines piracy as an act committed “by any person on the high seas where the offense is piracy by the law of nations.”⁹⁶ The High Court of Malaysia has jurisdiction to try all offenses that are committed within its own jurisdiction, onboard a Malaysia-flagged vessel on the high seas, or by any Malaysia citizen or resident on the high seas.⁹⁷

It is interesting to note the discrepancy in the definitions of piracy in the above domestic laws. In the United States, Great Britain, and Malaysia, an act must be committed on the high seas in order to qualify as piracy; in Kenya, a prosecutable act of piracy can be committed either in territorial waters or on the high seas;⁹⁸ and in the Philippines, the piratical act must be committed in Philippine waters in order to constitute piracy.⁹⁹ Moreover, the laws of the United States, Kenya, and Malaysia define piracy by referring to the law of nations: under these countries’ domestic laws, an act must constitute piracy under international law first to be criminalized as piracy under

92. 4 WILLIAM BLACKSTONE, COMMENTARIES 499 (John Bethune Bayly, ed., Saunders and Benning 1840).

93. Kraska & Wilson, *supra* note 9, at 46; *see also* Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT’L & COMP. L. 43, 55 (2009).

94. The Penal Code, (1967) Cap. 63 § 69 (Kenya).

95. Antipiracy and Anti-Highway Robbery Law of 1974, Pres. Dec. No. 532, § 2(d) (1974), (Phil.), *available at* http://www.asianlii.org/ph/legis/pres_decree/pdn532181/.

96. Courts of Judicature Act, (1964) § 22(1)(a) (iv) (Malay.).

97. *Id.*

98. *See supra* note 94 and accompanying text.

99. *See supra* text accompanying notes 87–97 (listing the different statutory requirements for piracy in different countries that have dealt with piracy).

domestic law.¹⁰⁰ The piracy laws of Great Britain and the Philippines, however, do not contain any such references to the law of nations.¹⁰¹

Thus, an additional hurdle in the global fight against piracy may be found in the dissimilarities among the various countries' definitions of piracy. For example, an act committed on the high seas may qualify as piracy for most countries, but if the offenders or victims are from the Philippines and if the Philippines are viewed as a logical prosecution forum for that reason, the offenders may not be prosecuted at all because the act was not committed in the Philippine territorial waters.¹⁰² Nations who captured the offenders may not be able to transfer them to the Philippines for prosecution and may simply have to release captured pirates for a lack of another option.¹⁰³

While the discrepancies among maritime nations' piracy laws are important, and may sometimes impede the fight against piracy, piracy is also the subject of several international treaties and regulations that offer a more uniform definition than the domestic laws. These treaties and regulations will be addressed in the following section.

B. *International Treaties and Regulations of Piracy*

Article 15 of the 1958 Convention on the High Seas (Convention on the High Seas) and Article 101 of UNCLOS¹⁰⁴ both contain the most universally accepted definition of piracy:

(1) Any illegal act 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, and directed: (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.¹⁰⁵

100. See *supra* text accompanying notes 87–97 (highlighting the similarities in antipiracy laws in the United States, Kenya, and Malaysia).

101. See *supra* text accompanying notes 87–97 (differentiating the piracy laws of Great Britain and the Philippines from the applicable statutory requirements in other countries).

102. See Azubuike, *supra* note 94, at 50 (limiting universal jurisdiction to international waters more than twelve nautical miles off the coast of the country).

103. See Antipiracy and Anti-Highway Robbery Law of 1974, Pres. Dec. No. 532, § 2(d) (1974), (Phil.), *available at* http://www.asianlii.org/ph/legis/pres_decree/pdn532181/ (limiting the definition of piracy to events that take place in Philippine waters, and not authorizing prosecution for criminals caught on the high seas).

104. UNCLOS, *supra* note 70, art. 101; United Nations Convention on the High Seas art. 15, Apr. 29, 1958, 450 U.N.T.S. 11, 90 [hereinafter Convention on the High Seas].

105. UNCLOS, *supra* note 70, art. 101; Convention on the High Seas, *supra* note 104, art. 15.

While some scholars have criticized the restrictive nature of the piracy definition in the Convention on the High Seas and UNCLOS, arguing that the two treaties actually narrowed the scope of piracy from its roots in customary law,¹⁰⁶ most agree that the above definition reflects international custom as it stands today.¹⁰⁷

The Convention on the High Seas/UNCLOS definition of piracy is restrictive for several reasons. First, the definition requires that the violent act be committed for private aims.¹⁰⁸ Although some scholars believe that the private aims requirement is intended to eliminate conduct committed on behalf of states or by state actors from the definition of piracy,¹⁰⁹ other scholars argue that this requirement disqualifies acts committed for political and ideological reasons from being considered piracy.¹¹⁰ These scholars suggest that an act of maritime terrorism committed to advance the political goals of a group, like al-Qaida or the PLO, may not qualify as piracy under the Convention on the High Seas/UNCLOS definition.¹¹¹ Second, the above piracy definition requires that the violent act be committed on the high seas.¹¹² The reasons for this limitation are logical: under traditional international law, anything that happens within the territorial sovereignty of a given state is a matter for that state alone to address and rectify.¹¹³ Because the crime of piracy is closely linked

106. See, e.g., Barrios, *supra* note 49, at 161 (arguing that under customary international law, piracy was more broadly defined than the narrow definition enshrined in UNCLOS).

107. Jon D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 NAVAL L. REV. 73, 92 (2008).

108. UNCLOS, *supra* note 70, art. 101; Convention on the High Seas, *supra* note 104, art. 15.

109. See, e.g., Bahar, *supra* note 8, at 27 (“Unless . . . terrorists were commissioned by a state, they are private actors.”); see also *id.* at 27–37 (discussing in detail why acts committed by terrorists can qualify as piracy).

110. Peppetti, *supra* note 107, at 92 (arguing that the private 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); see also *supra* Part I.C (utilizing the piracy issues in the Malacca Straits of Indonesia, and other areas to explain the “piratization of terrorism” and how the international community is attempting to fight this form of globalized, politicized crime).

111. Azubuike, *supra* note 94, at 52 (noting that the commonly held view is that acts of violence committed on religious, ethnic, or political grounds cannot be treated as piracy).

112. Under UNCLOS, the area comprised of twelve miles into the sea from the coastline of the littoral state constitutes the littoral state’s territorial waters; any areas beyond the territorial waters are considered part of the high seas. UNCLOS, *supra* note 70, art. 3; see also Azubuike, *supra* note 93, at 50 (articulating the 12 nautical mile requirements of UNCLOS and noting that up to 200 nautical miles may be claimed by the mainland country as an economic zone).

113. Bahar, *supra* note 8, at 18.

to the idea of universal jurisdiction, if the scope of piracy extends into a state's territorial waters, the universality of the crime collides with the territorial sovereignty of that state.¹¹⁴ Therefore, the high seas requirement for piracy is rational from an international law standpoint.¹¹⁵

While this may be true, the high seas requirement nonetheless disqualifies many acts of maritime violence from the definition of piracy. For example, if Somali pirates strike within the twelve-nautical-mile territorial sea of their home country, this act would not constitute piracy under the Convention on the High Seas/UNCLOS definition.¹¹⁶ Consequently, the Convention on the High Seas/UNCLOS jurisdictional regimes, which provide any nation interested in capturing pirates with the possibility of extending universal jurisdiction over such captured pirates, are not useful in the Somali context.

Another limiting factor is that the Convention on the High Seas/UNCLOS piracy definition requires the presence of two vessels for an act to qualify as piracy—an aggressor vessel must attack a victim vessel. Therefore, if hijackers board the victim vessel at its last port of entry and then overpower the ship's crew on the high seas, this act would not constitute piracy under the Convention on the High Seas/UNCLOS definition, because only one vessel is involved.¹¹⁷ While some scholars have argued that two vessels may not be required under the Convention on the High Seas/UNCLOS definition,¹¹⁸ the majority view and the plain reading of these conventions indicate that their drafters envision the presence of two vessels in their definition of piracy.¹¹⁹ Overall, the Convention on the High Seas and UNCLOS codify the law of piracy narrowly, perhaps

114. *Id.*

115. *Id.*

116. Peppetti, *supra* note 107, at 92–93.

117. Halberstam, *supra* note 76 (reasoning that universal jurisdiction on the high seas makes sense because the coastal state only has an interest in protecting its home waters).

118. *See* Bahar, *supra* note 8, at 38–39 (arguing that UNCLOS drafters merely intended to exclude from the definition of piracy “criminal acts by one passenger or crewmember against another” and also arguing that case law on piracy does not support a two-ship requirement).

119. *See, e.g.,* Azubuike, *supra* note 93, at 53 (explaining that the two-ship requirement is reasonable because it “emanates from the notion that a ship [being attacked] is always under the jurisdiction of the flag State,” so that “any act or offense committed on board [that] ship is subject to the domestic laws of the flag State”); *see also* UNCLOS, *supra* note 70, art. 101 (providing that piracy consists of violent acts committed “by the crew or the passengers of a private ship or a private aircraft” directed “against another ship or aircraft”) (emphasis added).

regrettably eliminating a multitude of acts of maritime aggression from the definition of piracy.

In addition to limiting the definition of piracy, the Convention on the High Seas and UNCLOS impose restrictions on states' ability to capture and prosecute pirates. The conventions provide that any state has jurisdiction to capture pirates on the high seas, as follows: "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."¹²⁰ The concept of universal jurisdiction over pirates is limited to the high seas, as these conventions do not authorize nations to pursue pirates in a state's territorial waters.¹²¹

These conventions further state that the capturing nation may then prosecute pirates in its domestic courts. Article 19 of the Convention on the High Seas and Article 105 of UNCLOS provide: "The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith."¹²² Under these conventions, however, the capturing nation may not transfer seized pirates to a third country for prosecution.¹²³ The idea of universal jurisdiction, therefore, gives limited options to piracy-fighting states, as their authority to pursue pirates ceases to exist outside the high seas, and the opportunity to prosecute pirates arises only in cases where the capturing state is also willing to prosecute.¹²⁴

120. UNCLOS, *supra* note 70, art. 105; Convention on the High Seas, *supra* note 104, art. 19.

121. UNCLOS defines the limit of territorial sea to twelve nautical miles offshore. UNCLOS, *supra* note 70, art. 3. Some nations, however, have taken a more aggressive approach in claiming that their exclusive economic zones, which typically extend out to 200 nautical miles, constitute territorial waters. *See* Dahlvang, *supra* note 54, at 24 (explaining that China claims 200 nautical miles off its coast as the area where the mainland has jurisdiction).

122. UNCLOS, *supra* note 70, art. 105; Convention on the High Seas, *supra* note 104, art. 19.

123. This conclusion follows from a close reading of the Convention on the High Seas and UNCLOS, and many scholars have embraced it. *See, e.g.*, Kontorovich, *supra* note 4 (relating the history of article 105 of UNCLOS, which does not allow a transfer of captured pirates to third parties for prosecution, and comparing that provision to the SUA Convention).

124. Note, however, that some scholars have argued that the Convention on the High Seas and UNCLOS do not prohibit a noncapturing state from prosecuting seized pirates. *See, e.g.*, Azubuike, *supra* note 93, at 54-55 (arguing that the jurisdiction of the capturing state is not exclusive but merely permissive because

If an act of maritime violence does not fall within the scope of the Convention on the High Seas/UNCLOS, the perpetrators cannot be apprehended or prosecuted under these conventions' jurisdictional basis. Consequently, countries willing to capture, detain, and prosecute violent maritime offenders may be forced to look to other laws in order to justify their anti-piracy operations.

Whereas the Convention on the High Seas/UNCLOS provisions sometimes leave gaps with regard to the capture and prosecution of pirates, the SUA Convention attempts to aid states in their fight against maritime violence by broadening the jurisdictional basis for the capture and prosecution of maritime aggressors.¹²⁵ The SUA Convention is considered an anti-terrorist treaty, and rather than defining piracy, it lists a series of maritime criminal offenses that are prohibited under the convention.¹²⁶ The list includes the following acts that, if committed, would likely endanger the safe navigation of the vessel: seizing or taking control of a ship by force or the threat of force, performing an act of violence against a person on board a ship, destroying or damaging a ship or its cargo, placing devices or substances on a ship that are likely to destroy that ship, knowingly communicating false information to a ship, and injuring or killing any person in connection with any of the above acts.¹²⁷

The SUA Convention does away with the restrictive elements of the Convention on the High Seas/UNCLOS definition of piracy. First, the SUA Convention does not have the private aims requirement of the Convention on the High Seas/UNCLOS treaties; thus, maritime terrorist acts driven by politics and ideology, and not simply private aims, would fall within the SUA Convention framework.¹²⁸ Second, the SUA Convention authorizes states to pursue maritime aggressors not only on the high seas, but anytime the victim vessel is in some

customary law provided for universal jurisdiction over pirates and UNCLOS codified customary law).

125. SUA Convention, *supra* note 76, art. 4.

126. Ratifying nations consider the SUA convention to be an antiterrorist convention. Bob Beckman, Comments at the American Society of International Law Annual Meeting (Mar. 26, 2009); *see also* Dahlvang, *supra* note 54, at 23 (noting that the SUA Convention does not refer to piracy by name).

127. SUA Convention, *supra* note 76, art. 4.

128. *See, e.g.*, Kontorovich, *supra* note 4 (noting the unique position and the broad scope the SUA Convention has in relation to customary international law); *see also* SUA Convention, *supra* note 76, art. 3 (describing various acts as piracy without the personal aims limitation).

form of international transit.¹²⁹ Third, the SUA Convention no longer requires the presence of two vessels; if hijackers board the ship when it is docked and overwhelm its crew and passengers at a later point in time, this act would fall within the SUA Convention definitional framework.¹³⁰ Moreover, the SUA Convention affords states more liberty in their attempts to prosecute aggressors. States under the SUA Convention framework may capture aggressors anywhere, and capturing states may transfer pirates to a third state for prosecution purposes.¹³¹

While the SUA Convention attempts to eliminate the restrictive elements of the Convention on the High Seas/UNCLOS definition of piracy, the former has not been as widely ratified and is not generally considered a part of customary international law.¹³² Regrettably, a number of the countries most affected by piracy, such as Indonesia, Malaysia, and Somalia, have not ratified the SUA Convention.¹³³ Thus, the SUA Convention may theoretically represent an attractive option for piracy-fighting countries, but its practical reach may prove limited because of its lack of universal acceptance and ratification.¹³⁴

After a significant increase in pirate attacks in the early 1990s, several organizations developed additional regulations aimed at combating piracy. The International Maritime Organization's

129. SUA Convention, *supra* note 76, art. 4; *see also* Peppetti, *supra* note 107, at 94 (comparing the SUA Convention's broad territorial reach with the narrower scope of UNCLOS).

130. Under the SUA Convention, any person who "seizes 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 76, art. 3.

131. The SUA Convention authorizes, and under certain circumstances requires, member states to establish jurisdiction over the perpetrators, either by extraditing them to another member state or prosecuting the perpetrators themselves. The following states are required to take measures necessary to establish jurisdiction over the perpetrators: the state of which the perpetrator is a national, the state in whose territorial waters the act was committed, and the flag state of the victim vessel. The following states are permitted to exercise jurisdiction over the offenses: the state of which the victim is a national, the state where the perpetrator has a habitual residence, or the state where the offense was committed if the motive was to compel a state to perform or to abstain from an act. Barrios, *supra* note 49, at 154–55.

132. *See* Azubuike, *supra* note 93, at 56 (expressing doubts as to the practical effectiveness of the SUA Convention, as it only applies to countries that have adopted the convention).

133. Bahar, *supra* note 8, at 26.

134. The SUA Convention has not been widely ratified by states for a variety of reasons. States may feel that the SUA Convention modifies the approach to piracy from the traditional view of piracy as sea-robbery toward piracy as a form of maritime violence and possibly maritime terrorism. States may feel reluctant to change their traditional conception of piracy, especially if they have not been targets of maritime terrorism. *See* Halberstam, *supra* note 76 (describing the impediments to ratifying the broader SUA Convention).

(IMO's) Maritime Safety Committee (MSC) developed two circulars in 1993, MSC/622 and MSC/623.¹³⁵ These two circulars make detailed recommendations to states for preventing and suppressing piracy and provide guidance to the shipping industry.¹³⁶ Additionally, in 2005, the IMO adopted Resolution A. 979 (24), which recommended taking legislative, judicial, and law enforcement action to capture and prosecute pirates.¹³⁷ These recommendations encouraged states to extradite pirates and to provide vessels that would cooperate in combating piracy.¹³⁸

The SUA Convention was amended in 2005 by adding protocols that called for member states to develop the capacity to capture and prosecute offenders and required member states to designate which government officials were authorized to receive and respond to requests for assistance, confirm offenders' nationality, and take other appropriate measures to curb pirate activity.¹³⁹ In Southeast Asia, the ASEAN Regional Forum (ARF) issued in 2003 its *Statement on Cooperation Against Piracy and Other Threats to Security*, which recognized that anti-piracy efforts "require regional maritime security strategies and multilateral cooperation in their implementation."¹⁴⁰ Participating countries agreed to exchange information, to discuss shipping lanes for tankers with coastguard or naval escorts, and to consider methods to provide "technical assistance[] and capacity-building infrastructure" to needy countries.¹⁴¹ ARF countries also agreed to support "efforts to establish a legal framework for regional cooperation to combat piracy."¹⁴² In November 2004, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia (ReCAAP) was finalized with the goal of enhancing cooperation

135. See Carbin, *supra* note 19, at 52 (describing the factors that led to the passage of IMO Doc. MSC/Circ. 622, which lists recommendations to governments for preventing and suppressing piracy and armed robbery against ships, and IMO Doc. MSC/Circ. 623, which gives guidance to shipowners, ship operators, shipmasters, and crews on preventing and suppressing acts of piracy and armed robbery against ships).

136. *Id.*

137. *Id.*; Int'l Maritime Org. [IMO], *Piracy and Armed Robbery Against Ships in Waters Off the Coast of Somalia*, IMO Assemb. Res. A. 979 (24) (Nov. 23, 2005), available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25750/A979%2824%29.pdf.

138. *Id.*

139. *Id.*

140. Tenth ASEAN Regional Forum, ASEAN REGIONAL FORUM STATEMENT ON COOPERATION AGAINST PIRACY AND OTHER THREATS TO SECURITY ¶ 1(h) (2003), available at <http://www.aseansec.org/14837.htm>.

141. Bahar, *supra* note 8, at 76.

142. *Id.* at 76-77.

among Asian nations affected by piracy.¹⁴³ ReCAAP created the Information Sharing Centre, which “facilitates the exchange of piracy-related information” among member states.¹⁴⁴

Finally, in 2008, the U.N. Security Council adopted five resolutions that addressed concerns about hijackings in Somali waters.¹⁴⁵ The resolutions authorized nations that patrol the Gulf of Aden to enter Somali territorial waters to fight or pursue pirates, and called on all states to cooperate in efforts to capture and prosecute offenders.¹⁴⁶ The first resolution adopted, Resolution 1816, authorized nations patrolling the Gulf of Aden to enter Somali territorial waters “for the purpose of repressing acts of piracy and armed robbery at sea,” and, while in Somali waters, to “[u]se . . . 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.”¹⁴⁷ Resolution 1816 effectively “make[s] the rules of international law concerning piracy on the high seas applicable also to territorial waters, *inter alia* permitting pursuit from the high seas into these waters.”¹⁴⁸ Moreover, Resolution 1816 gives patrolling nations the authority to use force within Somali territorial waters.¹⁴⁹

Another resolution passed by the U.N. Security Council in December 2008, Resolution 1851, gives patrolling nations the authority to “undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea.”¹⁵⁰ The Council’s use of the expression “in Somalia”

143. About ReCAAP ISC, <http://recap.org/aboutus.htm> (last visited Mar. 31, 2010).

144. Bahar, *supra* note 8, at 77. Fifteen countries are currently parties to the ReCAAP Agreement: the People’s Republic of Bangladesh, Brunei Darussalam, the Kingdom of Cambodia, the People’s Republic of China, the Republic of India, Japan, the Republic of Korea, the Lao People’s Democratic Republic, the Union of Myanmar, the Kingdom of Norway, the Republic of the Philippines, the Republic of Singapore, the Democratic Socialist Republic of Sri Lanka, the Kingdom of Thailand, and the Socialist Republic of Viet Nam. About ReCAAP ISC, *supra* note 143.

145. S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008); S.C. Res. 1846, U.N. Doc. (Dec. 2, 2008); S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008); S.C. Res. 1838, U.N. Doc S/RES/1838 (Oct. 7, 2008); S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).

146. S.C. Res. 1816, *supra* note 145, ¶¶ 2–4, 7(a).

147. *Id.* ¶ 7(a)–(b); *see also* Carbin, *supra* note 19, at 52 (noting that international law traditionally has permitted any state to capture pirates outside its jurisdiction).

148. Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EUR.J. INT’L L. 399, 400, 404 (2009).

149. *See* S.C. Res. 1816, *supra* note 145, ¶ 7(b) (referring to the “all necessary means” language).

150. S.C. Res. 1851, *supra* note 145, ¶ 6.

apparently authorizes action not only within Somali territorial waters but also on mainland Somalia.¹⁵¹ The expansive language of Resolution 1851 arguably expands the scope of hot pursuit of pirates by allowing chase to continue from Somali waters to Somali land.¹⁵² However, this expansion challenges the traditional international humanitarian law principle that civilians may not be targeted with force on land, except in cases of self-defense.¹⁵³ Somali pirates are also Somali civilians, albeit dangerous ones.¹⁵⁴ It is unclear how or if Resolution 1851's expanded authorization will be employed in reality.¹⁵⁵

Together, the five resolutions are designed to facilitate the task of safeguarding the Gulf of Aden by extending patrolling nations' jurisdictional and legal enforcement reach into Somalia. The resolutions, however, are limited in their scope because: (1) they only apply to Somalia; (2) they are not meant to establish any new rules of customary piracy law; (3) they require consent of the Somali government for any undertaken action; (4) they require the patrolling nations to respect international humanitarian law; and (5) they pertain only to the current patrolling nations in the Gulf of Aden.¹⁵⁶

Maritime powers and other nations willing to engage in the global fight against piracy have jurisdiction to capture, detain, and prosecute pirates based on domestic and international laws and regulations.¹⁵⁷ Some of these regulations, however, are limited in scope, and piracy-fighting countries may need to rely on creative legal arguments in order to support their antipiracy operations. The

151. Treves, *supra* note 148, at 404.

152. S.C. Res. 1851, *supra* note 145, ¶¶ 2, 6; *see also* Kontorovich, *supra* note 4 (arguing that the language in Resolution 1851 broadens the use of force against pirates because a state can pursue the pirate once on dry land).

153. *See* Kontorovich, *supra* note 4 (emphasizing that the Security Council resolutions require that anti-pirate actions taken in Somali territory be approved by the Somali provisional government and be consistent with international humanitarian law).

154. *Id.*

155. *Id.* (explaining that the powers granted by the anti-pirate resolutions have gone "largely if not entirely unutilized, with military action against pirates taking place in international waters and confined to small, reportedly defensive incidents").

156. *See* Treves, *supra* note 148, at 404–08; *see also* Milena Sterio, *Fighting Piracy in Somalia (and Elsewhere): Why More Is Needed*, 33 *FORDHAM INT'L L.J.* (forthcoming 2010).

157. *See* John Bradford, *Shifting the Tides Against Piracy in Southeast Asian Waters*, 48 *ASIAN SURV.* 473, 485 (2008) (noting that the Southeast Asian Cooperation Against Terrorism (SEACAT), which includes nations such as the United States, Thailand, and Malaysia, enables countries to share resources in the pursuit of capturing and deterring pirates).

involvement of the U.N. Security Council will hopefully both provide piracy-fighting countries with more direct legal support for their actions and continue until this problem is solved.

III. PRACTICAL RESPONSES TO ELIMINATE PIRACY

The most significant practical solutions to eradicate piracy, in Somalia or elsewhere, include (1) a serious commitment by the affected state to fight pirates; (2) regional cooperation between the affected state and its neighbors; (3) law enforcement and diplomatic efforts to combat piracy; and (4) building the capacity of the affected state by the most powerful maritime nations. These solutions have already been employed in Southeast Asia, where piracy surged in the late 1990s and the early 2000s but has been curbed and almost eradicated in recent years. The Southeast Asian model will therefore be examined below, and its application suggested for the Somali piracy problem.

A. *State Commitment*

The best results in the fight against piracy can be achieved if the territorial state—the place where pirates base their operations, dock their ships, and keep their prey—makes a significant commitment toward eliminating piracy.¹⁵⁸ First, territorial states can combat piracy by enacting harsh domestic criminal statutes that routinely hand down stiff jail sentences to pirates.¹⁵⁹ Moreover, territorial states can take an active role in antipiracy efforts by increasing law enforcement efforts to patrol their coastlines and regional waters, ensuring that pirates do not thrive undetected in areas beyond the reach of the law.¹⁶⁰ Finally, territorial states can crack down on the pirates' communication with their supplier networks, which cuts off the logistical support upon which pirate operations heavily rely.¹⁶¹

States are most successful at fighting piracy when they are able to invest substantial resources in combating pirates.¹⁶² States that have seen some success include Indonesia, Malaysia, and Singapore, all of

158. *Id.* at 478.

159. *Id.* at 479–81.

160. *See id.* at 481 (explaining that after establishing the Malaysian Maritime Enforcement Agency, the Malaysian government increased enforcement efforts to control waterways and deter pirates).

161. *See id.* at 480 (discussing the situation in Malaysia, where the government is targeting corrupt officials and military officers who are essential to the pirates' operations).

162. *Id.* at 479.

whom have battled pirates in the Malacca Strait and will be discussed below.

Indonesia has strengthened its maritime security programs in recent years by demonstrating that it is willing to crack down on piracy on all levels.¹⁶³ The Indonesian government has acted against pirates' shore contacts by attempting to rein in corrupt officials and military officers whose support is necessary for successful piracy operations.¹⁶⁴ Indonesia has also focused increasingly on maritime security operations by sending over twenty navy ships and several aircraft into pirate-infested waters.¹⁶⁵ The Indonesian efforts seem to be working; for example, in March 2006, Indonesian marines and special forces successfully liberated a 1,400-passenger ferry that had been hijacked by fifteen pirates.¹⁶⁶

Malaysia has also been determined in its efforts to reduce piracy on its side of the Malacca Strait.¹⁶⁷ The Malaysian government devoted specific resources to areas where government control was the weakest.¹⁶⁸ In those areas, the Malaysian government launched programs to establish greater awareness and control over waterways and to deter pirates from attacking in such waters.¹⁶⁹ Malaysia also established the Malaysian Maritime Enforcement Agency, which began patrols at the end of 2005.¹⁷⁰ According to Malaysian officials, the increased patrols have resulted in several pirate arrests, and IMB numbers show that the number of pirate attacks in the Strait of Malacca has significantly decreased in the last few years.¹⁷¹

Singapore, like Indonesia and Malaysia, has contributed to joint patrols in the Strait of Malacca "using commandos, frigates, and swift patrol boats."¹⁷² Singapore has also ratified ReCAAP, whereby it will participate in the agreement's regional piracy-fighting scheme.¹⁷³ As in the example of Malacca Strait countries, significant territorial state

163. *But see id.* at 479–80 (noting that Indonesia "remains a country with one of the world's highest piracy rates and the state remains distracted by other higher priority concerns" such as "suppressing terrorism . . . and alleviating poverty").

164. *Id.* at 480.

165. *Id.*

166. *Id.*

167. *Id.*

168. *See id.* at 480–81 (noting that the Malaysian government shifted its antipiracy efforts to the waters around Sabah in East Malaysia where the lack of enforcement was greatest).

169. *Id.* at 481.

170. *Id.*

171. *Id.* at 480–81.

172. Bahar, *supra* note 8, at 81.

173. *Id.* at 77.

commitments to tackle piracy can contribute toward the decrease of piracy attacks and even toward a complete eradication of pirate activity.

While the above approach could work well in some regions, it may pose significant challenges in chaotic and lawless countries like Somalia, where piracy often thrives.¹⁷⁴ “Piracy typically occurs where gaps exist in political control because it is in such areas that the capacity of states to deal with the problem is weakest.”¹⁷⁵ While increased commitment on behalf of the territorial state to deal with pirates helps tremendously, such commitment simply may not be possible because of Somalia’s lack of political, law enforcement, and military capacity to confront the problem. To eradicate Somali piracy, regional cooperation and capacity building may prove more successful.

B. Regional Cooperation

When pirate attacks first surged in the Malacca Strait, the Southeast Asian states that were most affected seemed hesitant to work together and uninterested in establishing any form of active cooperation against piracy.¹⁷⁶ That attitude has changed in the past few years, as Southeast Asian states realized that regional cooperation may be the best approach in the fight against piracy.¹⁷⁷ During the late 1990s, Southeast Asian states actively participated in regional meetings and discussed possible “confidence-building” activities.¹⁷⁸ These types of arrangements proved to be insufficient against Malacca Strait pirates.¹⁷⁹ Since 2003, regional governments have undertaken more significant cooperative efforts.¹⁸⁰ In a series of statements, Southeast Asian states demonstrated their increased

174. Sterio, *supra* note 156.

175. Bradford, *supra* note 157, at 478.

176. *Id.* at 481.

177. *See id.* at 482; Kraska & Wilson, *supra* note 9, at 44 (noting that in response to the piracy threat in the Strait of Malacca, Singapore, Indonesia, and Malaysia “embarked on a program of coordinated air and sea patrols that dramatically reduced marine piracy throughout the straits”); *see also id.* (describing the U.S. response to piracy in 2007 which emphasized collaborative action between maritime countries).

178. Stanley Weeks, *New Initiatives in Maritime Cooperation*, in *THE BEST OF TIMES, THE WORST OF TIMES: MARITIME SECURITY IN THE ASIA-PACIFIC* 251, 253 (Joshua Ho & Catherine Zara Raymond eds., 2005).

179. Mark Valencia, *Piracy and Politics in Southeast Asia*, in *PIRACY IN SOUTHEAST ASIA: STATUS, ISSUES, AND RESPONSES* 103, 105 (Derek Johnson & Mark Valencia eds., 2005).

180. Bradford, *supra* note 157, at 482.

resolve to seriously tackle piracy problems.¹⁸¹ As a result, Malaysia, Indonesia, and Singapore committed to cooperate with each other.¹⁸² In July 2004, these three governments improved information sharing and began a program of “trilateral coordinated maritime surface patrols called the Malacca Strait Sea Patrols.”¹⁸³ In the years following the initial program, the agreement was expanded to link surface and air patrols with intelligence exchange in order to coordinate efforts of surface and air units.¹⁸⁴ Moreover, the three governments coordinated airborne surveillance under the so-called “Eyes in the Sky” agreement.¹⁸⁵ “In the past few years, Southeast Asian littoral states that had previously sought to downplay piracy have openly acknowledged the problem, cooperation has risen to new levels, and the three states bordering the Strait of Malacca have expanded the forces deployed to deter attacks and catch pirates.”¹⁸⁶ The decrease in the number of pirate attacks in the Malacca Strait confirms that regional cooperation between the Malaysian, Indonesian, and Singaporean governments has been effective and successful in piracy-fighting efforts.¹⁸⁷

A similar type of regional cooperation has been established in West and Central Africa. In July 2008, member states of the Maritime Organization of West and Central Africa adopted a Memorandum of Understanding (MOU) to create a joint coast guard and to authorize hot pursuit of pirates off the coast of Nigeria.¹⁸⁸ It will be interesting to follow developments off the Nigerian coast to determine whether regional cooperation in West and Central Africa will lead to a decrease in piracy. Considering the success of the Southeast Asia program, this likely will be the case.

A similar type of regional cooperation could certainly be discussed for Somalia. While Somalia does not have a government capable of

181. *See id.* (discussing statements issued by organizations such as the Tenth ASEAN Regional Forum that met in Phnom Penh in June 2003, the June 2005 Shangri-la Dialogue in Singapore, the Batam Joint Statement of the fourth Tripartite Ministerial Meeting of the Littoral States on the Strait of Malacca of August 2005, and the Jakarta Statement on Enhancement of Safety, Security, and Environmental Protection in the Strait of Malacca and Singapore of September 2005).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *See* Kraska & Wilson, *supra* note 22, at 54 (noting that “[a] regional approach to piracy in the Strait of Malacca and Singapore has led to significant reduction in the incident of maritime piracy”).

188. Carbin, *supra* note 19, at 55.

significantly contributing to joint regional efforts to combat piracy, other littoral states may be able to work together on this significant problem. Kenya has already expressed its willingness to act as a strong regional partner to the world maritime powers by agreeing to prosecute

captured pirates in its domestic courts.¹⁸⁹ Arabian Peninsula countries could similarly deploy more resources toward combating piracy, especially in light of the challenge that piracy poses for oil tankers that routinely pass through the Gulf of Aden.¹⁹⁰

Moreover, strong maritime countries could work closely with regional partners on anti-piracy efforts. For example, in November 2008, the European Union established Operation Atlanta against Somali pirates, and in January 2009, a multinational task force, which included representatives from major maritime powers, created a coalition of patrolling nations to protect the Gulf of Aden.¹⁹¹ Such maritime patrols led by maritime powers have successfully deterred pirates and, in some cases, detained them.¹⁹² In addition, these maritime patrols could partner with regional countries, such as Kenya and the Arabian Peninsula states, to improve the scope and breadth of law enforcement operations. Even in the absence of Somalia, increased regional cooperation between Kenya, the Arabian Peninsula countries, and some of the largest maritime powers already present in the Gulf of Aden, could contribute significantly toward the

189. See Kraska & Wilson, *supra* note 22, at 51 (describing the attempt by Somali pirates to hijack the *Safina al Bisarat* in 2006). A U.S. battleship that was in the vicinity managed to seize control of the pirate vessel and detain ten pirates. *Id.* The pirates were transferred to Mombasa, Kenya, convicted, and sentenced to seven-year prison sentences. *Id.*

190. *Id.* It is worth noting that the IMO hosted a regional meeting in the Arabian Peninsula twice: in Yemen in 2005 and in Oman in 2006. These meetings were focused on the possibility of establishing regional agreements to implement antipiracy measures. *Id.* at 54.

191. Carbin, *supra* note 19, at 52.

192. See, e.g., Daniel Wallis, *NATO Frees 20 Hostages; Pirates Seize Belgian Ship*, REUTERS, Apr. 18, 2009, <http://www.reuters.com/article/idUSLI11637320090418> (last visited on Mar. 20, 2010) (noting that France has brought captured pirates to Paris for prosecution); see also Al Goodman, *Somali Pirate Suspects Indicted in Spain*, CNN.COM, (Nov. 16, 2009)

<http://edition.cnn.com/2009/WORLD/europe/11/16/spain.pirates/index.html> (discussing that Spain indicted two Somali pirates in a Spanish court); *Suspect in Ship Hijacking Charged with Piracy*, CNN.COM, (Apr. 21, 2009)

<http://www.cnn.com/2009/CRIME/05/20/ny.pirate.indictment/index.html> (noting that the United States has indicted a detained Somali pirate in a U.S. court).

eradication of Somali piracy.¹⁹³ The Strait of Malacca regional cooperation model should be examined carefully as a viable solution to the Somali piracy problem.

C. Capacity Building

The world's biggest maritime powers should be willing and able to help fight Somali piracy. In the context of Southeast Asian piracy, countries like Australia, China, India, Japan, and the United States all offered different forms of assistance.¹⁹⁴ As mentioned above, NATO countries have also assisted in the Gulf of Aden by forming regular patrols that often chase and apprehend pirates.¹⁹⁵ Capacity building through continuous assistance by the world's maritime powers is a key element to a successful long-term solution against piracy.¹⁹⁶ In the case of Somalia, capacity building and assistance by maritime powers is even more essential than it was in Southeast Asia. Indonesia, Malaysia and Singapore, the three Southeast Asian nations most affected by piracy in the Malacca Straits, are relatively stable nations that were able to fight piracy on their own to a certain degree. Somalia, to the contrary, is a failed state and can do very little to curb piracy off its coast.¹⁹⁷ Because of their stability, Indonesia, Malaysia, and Singapore were able to collaborate successfully on anti-piracy operations; Somalia, however, is unlikely to be capable of cooperating successfully and contributing to any regional antipiracy efforts. Thus, the case for capacity building in Somalia seems even stronger than that of its counterpart in Southeast Asia.

Japan, a powerful maritime nation, is an excellent model for the types of capacity-building and assistance that countries like Somalia may need. Over the last decade, the Japanese Coast Guard has been conducting anti-piracy exercises throughout the Southeast Asian region.¹⁹⁸ Japan also provides direct assistance to littoral states; for example, it has provided Malaysian forces with "satellite tracking

193. See Kraska & Wilson, *supra* note 9, at 41 ("While it is impossible to eradicate maritime piracy completely, the threat can be greatly reduced if we broaden efforts to work with international partners.").

194. Bradford, *supra* note 157, at 483.

195. See, e.g., Kraska & Wilson, *supra* note 9, at 42 (recognizing the combined patrol efforts of NATO and the European Union).

196. Bradford, *supra* note 157, at 483.

197. Treves, *supra* note 148, at 400.

198. See Bradford, *supra* note 157, at 483–84 (discussing the material and training that Japan has offered to neighboring countries because of the threat pirates pose to its national security and economic stability).

systems, satellite telephones, high-capacity computers, and radio communications systems.”¹⁹⁹ Japan has also pledged over \$15 million to Indonesia to construct patrol ships and vessels.²⁰⁰ On a multinational level, Japan’s prime minister initially proposed ReCAAP, the world’s first inter-governmental body focused on piracy, and thirteen other regional states joined the agreement.²⁰¹

The United States has also contributed to the fight against piracy.²⁰² United States maritime forces have conducted a series of exercises with their Southeast Asian regional partners.²⁰³ Moreover, the United States has been promoting the systemic sharing of information and the use of information technologies that enable regional states to better identify, capture, and deter pirates.²⁰⁴ Although some Southeast Asian states were initially skeptical about American intrusion into their sovereign waters, officials from Malaysia and Singapore have recently expressed enthusiasm about increased American efforts to help curb Malacca Strait piracy.²⁰⁵ If American or other foreign nations’ involvement in Somalia is carefully planned so that any military operations within the Somali territory retain their antipiracy scope and do not appear to threaten Somali sovereignty and territorial integrity, then such foreign powers’ involvement likely will be appreciated and welcomed in East Africa.²⁰⁶

Similar but more comprehensive capacity building efforts need to occur in Somalia. Maritime powers such as the United States need to realize that their own interests may be indirectly threatened by the increased incidence of pirate attacks in the Indian Ocean.²⁰⁷ Somali

199. *Id.* at 484.

200. *Id.*

201. *Id.*; see also *supra* notes 145–47 and accompanying text (describing the ASEAN Regional Forum and the efforts of its member countries).

202. Bradford, *supra* note 157, at 484.

203. *Id.* at 485.

204. *Id.*

205. *Id.*

206. See, e.g., Peter O’Neil, *Aid Agencies Release Scathing Critique of Afghan Counter-insurgency Efforts*, CANADA.COM, Apr. 3, 2009, <http://www.canada.com/news/agencies+release+scathing+critique+Afghan+counter+insurgency+efforts/1460393/story.html> (suggesting that interference by other nations is not easily accepted and noting that a group of international aid agencies issued a scathing report regarding counter-insurgency efforts by countries such as the United States, the United Kingdom, and Canada). Great powers such as the United States have been criticized for their over involvement in other nations’ internal affairs. *Id.* Thus, a power such as the United States must be careful in its approach to Somalia in order to ensure that any military involvement corresponds to pure antipiracy operations and does not resemble intervention or invasion.

207. Bradford, *supra* note 157, at 484 (noting that the United States assisted in the eradication of Southeast Asian piracy because of “non-traditional security concerns” such as terrorism and seaborne proliferation of weapons of mass destruction).

pirates may develop ties to terrorist groups that operate directly against American interests such as al-Qaida.²⁰⁸ Moreover, Somali pirates could fund or partner with other terrorist organizations and thus contribute to an overall rise in global violence.²⁰⁹ Somali piracy could also threaten the regional stability of East Africa, and has the potential to undermine the national security of neighboring states like Ethiopia and Kenya, which, although more stable than Somalia, already have their share of domestic problems.²¹⁰ Accordingly, maritime powers like the United States need to begin investing in Somalia, and should undertake significant capacity building projects, as Japan did in Southeast Asia, to help stabilize the region.

IV. SOLUTIONS FOR SOMALIA

Many legal and practical tools, some theoretical and some already utilized in Southeast Asia, are available to fight Somali piracy. But the question remains: once Somali pirates are captured by piracy-fighting nations, where should they be brought to justice? The sections below explore this question and seek to provide insightful answers.

A. *Legal*

As stated above, fighting piracy in Somalia should be grounded in law: countries involved in patrolling the coast of Somalia need to both have a sound basis available to justify their seizure of pirates and find appropriate tribunals willing to prosecute detained individuals.²¹¹

1. *Jurisdiction*

Piracy-fighting countries can rely on a variety of international treaties, customary law, and U.N. Security Council resolutions in order to justify their capture and prosecution of apprehended pirates. UNCLOS, the most widely accepted international maritime treaty,²¹² already provides that any nation may capture pirates on the high seas. The capturing nation may then prosecute pirates in its

208. See *supra* Part I.C (discussing the link between piracy and terrorism).

209. *Id.*

210. Kraska & Wilson, *supra* note 9, at 43 (noting that the issues in this region range from disrupting maritime communication to hindering the delivery of oil throughout the world).

211. See *supra* Parts II.A, II.B (discussing both domestic and international piracy laws).

212. See *supra* Part II.B. (discussing UNCLOS in relation to other maritime treaties).

domestic courts.²¹³ The SUA Convention extends the jurisdictional basis for the capture and prosecution of pirates by allowing any nation to capture pirates if the victim vessel was in some form of international transit, and by authorizing both the capturing nation and other willing nations to prosecute the captured pirates.²¹⁴ A combination of these two treaties would arguably fill the jurisdictional gaps and would prevent pirates from escaping capture and prosecution through legal jurisdictional maneuvers.²¹⁵

The problem with this hypothesis is two-fold. First, the SUA Convention is not as widely accepted as UNCLOS and does not represent customary international law.²¹⁶ Thus, countries that are not signatories to the SUA Convention, such as Somalia, Indonesia, and Malaysia, may escape its reach by pointing out that they never agreed to the convention's extended jurisdictional reach.²¹⁷ Second, even countries bound by the SUA Convention have other legal obligations that may impede the functioning of this maritime treaty. For example, many western democracies are party to major human rights treaties, such as the International Covenant on Civil and Political Rights or the Convention Against Torture.²¹⁸ All such human rights treaties prohibit the transfer of any individual to a country where the individual is likely to be tortured (the non-refoulement obligation).²¹⁹ Consequently, a capturing nation that is bound by these human rights treaties may not be able to transfer captured pirates to a third state willing to prosecute them if there is a strong likelihood that the third state would torture pirates.²²⁰ In this regard, human rights obligations may have the effect of limiting broad prosecution regimes such as SUA, thereby reducing their practical value.

Piracy-fighting countries may be able to circumvent the above issues by relying on international custom. In fact, some scholars argue that UNCLOS did not simply codify existing international

213. UNCLOS, *supra* note 70, art. 105.

214. See SUA Convention, *supra* note 76, art. 7.

215. Kraska & Wilson, *supra* note 9, at 52 ("Piracy thus flourishes at the seams of globalization because jurisdiction is unclear and pirates exploit the inherent isolation of individual vessels and nations.").

216. Alfred P. Rubin, *The Fletcher Sch.*, Tufts Univ., Comments at ASIL Meeting (Mar. 26, 2009).

217. Azubuike, *supra* note 93, at 56 (concluding that the SUA Convention is not reflective of customary law and only binds its signatory parties).

218. Kontorovich, *supra* note 4, at n.9 (noting that such treaties include the Geneva Conventions on the Law of War and the International Covenant on Civil and Political Rights).

219. *Id.*

220. *Id.*

customary law in the area of piracy, but rather restricted existing customary norms.²²¹ Thus, customary law goes farther than UNCLOS in providing jurisdiction to both capture and prosecute pirates.²²² If piracy-fighting countries can establish that international custom in the area of piracy law allows nations to pursue and apprehend pirates anywhere, not simply on the high seas, then nations potentially could target Somali pirates without worrying about territorial sea restrictions.

Moreover, while it is true that hot pursuit of pirates into the Somali territorial waters would violate state sovereignty under article 2(4) of the U.N. Charter,²²³ one can advance the argument that apprehending pirates does not undermine Somali territorial integrity. In fact, capturing pirates could work to strengthen Somalia's territorial integrity by ensuring that rogue pirate operators do not threaten its future stability. Piracy-fighting nations would simply be doing something that Somalia could and should do for itself—capturing dangerous pirates.²²⁴ No evidence suggests that such actions threaten Somalia as a country or its sovereign national interests.

Furthermore, if piracy-fighting countries can establish that international custom in the area of piracy law allows any state, not simply the capturing state, to prosecute pirates under the principle of universal jurisdiction, then the legal hurdle of finding an adequate forum to try Somali pirates could be surmounted. "Piracy is the original universal jurisdiction crime,"²²⁵ and it can be argued under customary law that the principle of universal jurisdiction itself would be contradicted by the limitation of allowing only the capturing

221. See Barrios, *supra* note 49, at 162 (asserting that UNCLOS represents a "significant departure from what the international community accepted as piracy").

222. Bahar, *supra* note 8, at 27–38 (exploring the customary law definition of piracy, arguing that it embraces acts of maritime terrorism committed for political aims, and then alleging that UNCLOS simply codifies this broader definition of piracy under customary law).

223. See U.N. Charter art. 2, para. 4, (prohibiting member states from using force against any other member state in violation of that state's sovereignty and territorial integrity).

224. In fact, scholars have already argued that the UNCLOS system of requiring that the act of piracy happen on the high seas in order for the convention's universal jurisdiction provisions to be triggered works only if the coastal state has a municipal law proscribing pirate attacks, is willing to enforce it, and is physically able to do so. See Bahar, *supra* note 8, at 19 (concluding that in Somalia, the UNCLOS system does not work because Somalia is unable to do anything about the pirate attacks due to the absence of a functional government).

225. Kontorovich, *supra* note 4; see also Azubuike, *supra* note 93, at 44 (noting that under customary international law, pirates were subject to universal jurisdiction by any state).

nation to bring pirates to justice. Pirates, after all, are *hostis humani generi*, and as such, they should face justice in any willing state's courts, regardless of whether that state captured them or not.²²⁶ Thus, customary law may help piracy-fighting countries by filling the UNCLOS-inflicted gaps and by extending the treaty's reach.

Piracy-fighting countries in the Somali context can also rely on U.N. Security Council Resolutions, which expand the geographical area in which pirates can be effectively apprehended.²²⁷ The five different resolutions, passed in 2008, allow nations that routinely patrol the Gulf of Aden to enter Somali territorial waters if seeking to capture pirates.²²⁸ The resolutions allow patrolling nations to penetrate the Somali mainland in their piracy-fighting operations, as well as to engage in the hot pursuit of pirates on Somali territory.²²⁹ The resolutions are thus an important legal tool for piracy-fighting countries because they extend jurisdiction to capture pirates into an otherwise prohibited zone: the Somali territorial waters and mainland. While it is true that the resolutions also contain limitations,²³⁰ they nonetheless represent an important vehicle allowing patrolling nations' navy ships to combat pirates. Moreover, to the extent that the above customary international law arguments are accepted, they would supplement the Security Council resolutions and would apply to the Somali context even if the resolutions themselves were no longer temporally applicable.

2. Piracy trials

Piracy fighting countries currently face a tremendous problem: what to do with captured pirates? Determining which state could and should prosecute pirates captured at sea is difficult, and "it takes

226. Azubuike, *supra* note 93, at 44 (commenting that under customary international law, pirates were treated as "enemies of human kind").

227. See *supra* Part II.B (discussing the various international treaties regulating piracy).

228. See *supra* notes 146–156 and accompanying text (discussing the passage and substance of the five U.N. Security Council resolutions relating to piracy passed in 2008).

229. Kontorovich, *supra* note 4.

230. Treves, *supra* note 148, at 404–08 (discussing the resolutions' limitations, which include: temporal jurisdiction; the fact that each resolution is only valid for a six-month period and needs to be renewed thereafter by the U.N. Security Council; the need to obtain consent from the Somali government for each transgression into Somali territory by the patrolling nations; the fact that authority to enter Somali territory is only given to countries presently patrolling the Gulf of Aden; the fact that each resolution specifies that it only pertains to Somalia and does not purport to modify customary law; and the necessity for the patrolling nations in each instance to respect international humanitarian law).

awhile to sort out the logistical and legal issues.”²³¹ This Article argues that maritime powers interested in combating Somali pirates should ensure that pirates are tried in criminal forums.²³² Various prosecution options exist, ranging from domestic trials in the courts of the capturing or transferee nations, to international trials in specialized piracy tribunals.

First, pirates could always be prosecuted in the domestic courts of the capturing nation.²³³ While piracy trials may be logistically difficult, costly, and politically challenging, piracy is a serious crime and should never go unpunished and undeterred.²³⁴ Piracy-fighting countries should overcome their own political unwillingness to prosecute individual pirates, and routinely bring captured pirates to trial in their own courts. Major maritime powers, like the United States, France, and Spain, have already begun criminal proceedings against captured pirates; more nations should follow suit in this direction.²³⁵

Second, pirates could also be prosecuted in the domestic courts of a regional partner—a nation willing to take all captured pirates and to subject them to its own criminal process. The United Kingdom, a maritime power uninterested in prosecuting pirates domestically,²³⁶ has experimented with this option. The country has entered into an MOU with Kenya, a regional partner, whereby Kenya has agreed to prosecute any pirates the United Kingdom transfers to it.²³⁷ This agreement, although of dubious legality under UNCLOS, may work

231. Kraska & Wilson, *supra* note 9, at 45.

232. Unfortunately, some pirates have already been released from custody by the capturing nation because of a lack of an available legal forum in which to prosecute them. For example, in September 2008, the Danish navy released several captured pirates on a Somali beach because of unclear jurisdictional rules. *Id.* at 46. This approach, dubbed “catch and release,” has been criticized. *Id.*

233. Prosecuting Somali pirates in Somalia is not currently an option because Somalia is a failed state and does not have any responsible legal authorities capable of conducting a piracy trial. *Id.*

234. See *supra* Part I.C.1. (discussing the importance of deterring Somali pirates).

235. France successfully captured pirates twice in 2008 and brought the pirates to trial in Paris. Kraska & Wilson, *supra* note 9, at 46. Spain has recently brought two pirates to Spain to stand trial there. Goodman, *supra* note 192. In April 2009, after a group of pirates attempted to seize the *Maersk Alabama* in the Indian Ocean, the United States captured a pirate and brought the detained pirate to New York to stand trial. *Suspect in Ship Hijacking Charged with Piracy*, *supra* note 192.

236. See Kraska & Wilson, *supra* note 9, at 46 (noting that the British Foreign Ministry has indicated that pirates brought into the country to be prosecuted “could be granted political asylum”).

237. *Id.*; see also Azubuike, *supra* note 94, at 55 (discussing the agreement between the United States, the United Kingdom and Kenya governing the transfer of captured pirates to Kenya for trial).

well.²³⁸ For example, a group of pirates captured in 2006 were prosecuted in Kenya and given seven-year prison sentences.²³⁹ Additional trials of this sort may help strengthen the transfer mechanism and send a strong deterrent message to Somali pirates, who can expect to face trial in Kenya instead of anticipating release if captured by the United Kingdom.²⁴⁰ Other maritime powers should reach out to regional partners willing to prosecute Somali pirates, in the way the United Kingdom reached out to Kenya.²⁴¹

Regional partnerships are an attractive option for a variety of reasons. First, these partnerships end the cycle of impunity by ensuring that pirates do not avoid prosecution simply because the capturing nation does not want to try them in its domestic courts. Under this model, captured pirates would always be transferred to a partner state for prosecution. Moreover, regional partnerships allow for a regional solution to piracy.²⁴² Instead of transferring captured pirates to a geographically distant country, like the United States or the United Kingdom, this model allows pirates to be prosecuted in the courts of a regional partner, such as Kenya, a country bordering Somalia.

Second, regional trials espouse a number of benefits. Regional trials may send a stronger deterrent message to existing pirates, who may hear and know more about a Kenyan trial than an American or British proceeding. Regional trials may also illustrate that African countries are capable of dealing with problems on their own and that the developed world need not impose its own justice by handing

238. The majority of scholars interpret UNCLOS as authorizing only the capturing nation to prosecute pirates, and as prohibiting pirate transfers to third countries for prosecution. See Kontorovich, *supra* note 4 (stating that UNCLOS drafting history makes clear that it was “intended to preclude transfers to third-party states”).

239. Kraska & Wilson, *supra* note 9, at 47.

240. In another piracy incident—the hijacking of the Japanese tanker *Alondra Rainbow*—the Indian Navy captured the pirates and their ship and transported the ship to India, where the pirates were prosecuted and convicted. India, therefore, has also conducted a domestic piracy trial. Azubuike, *supra* note 93, at 55; see also Peppetti, *supra* note 107, at 108–09 (discussing the *Alondra Rainbow* incident in more depth and noting that India tried the pirates under universal jurisdiction, as there is no piracy jurisdiction in the Indian penal code).

241. The United States also signed an MOU with Kenya on Jan. 16, 2009. See James Thuo Gathii, *Jurisdiction to Prosecute Non-national Pirates Captured by Third States Under Kenyan and International Law*, 32 LOY. L.A. INT’L & COMP. L. REV. (forthcoming 2010), available at http://works.bepress.com/james_gathii/16/. Kenya also signed a similar MOU with the European Union on March 6, 2009, and another MOU has been discussed between Kenya and China. *Id.*

242. Bahar, *supra* note 8, at 83 (arguing that regional pirate prosecution reinforces the view that Africans are capable of establishing and maintaining a good system of governance).

down western criminal sentences to captured pirates.²⁴³ Finally, regional trials make sense logistically: evidence and witnesses are located much closer to Kenya than to the United States or Britain and therefore, Kenyan courts may face significantly fewer hurdles in the prosecution of Somali pirates than their American or British counterparts.²⁴⁴ Therefore, maritime nations combating Somali pirates should explore regional partnerships more substantially.

Third, pirates could be prosecuted in an ad hoc piracy tribunal. Scholars have considered the idea of a new ad hoc tribunal dedicated to the issue of piracy that would be located in the region and routinely prosecute captured Somali pirates.²⁴⁵ This idea is appealing from a theoretical standpoint, but it may have significant drawbacks from a practical standpoint. Establishing a new tribunal would be difficult to say the least: the tribunal must be located in a country willing and capable of accommodating an international body; include highly-trained judges who are experts in maritime law; and provide fine-tuned laws to ensure all captured pirates receive a fair and just trial.²⁴⁶ From a cost perspective, the establishment of a new ad hoc piracy tribunal may simply outweigh the resources available to fight piracy. An ad hoc piracy tribunal, for all the above reasons, will likely never be established.

Fourth, pirates could be prosecuted in the International Criminal Court (ICC), provided that the court's jurisdiction is amended to allow prosecutions of piracy-related crimes.²⁴⁷ Some scholars have already expressed regret that the ICC statute as originally drafted did not contemplate the crime of piracy.²⁴⁸ Because piracy is a universal jurisdiction crime, it is logical that pirates would be prosecuted in the only universal criminal court. When the ICC statute was negotiated, piracy seemed to have vanished and certainly did not represent the issue of global magnitude that it does today. Thus, the ICC drafters

243. *Id.*

244. *Id.* at 82.

245. *Id.* at 81–84 (advocating for the creation of a regional piracy court in Kenya).

246. See Peppetti, *supra* note 107, at 142 (noting that creating an ad hoc tribunal “would require significant effort and depend upon a strong desire for individual accountability coupled with a willingness to delegate sovereignty over certain criminal justice matters”).

247. See Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT'L & COMP. L. REV. 293, 328–30, 335 (2006) (arguing that ICC jurisdiction should be expanded to include a crime of terrorism and that piracy should fall within the definition of terrorism and thus be covered by the newly expanded ICC statute).

248. Azubuike, *supra* note 93, at 55 (“It is a gaping omission that the Statute of the International Criminal Court did not deal with piracy.”).

may not have had enough of an interest or incentive to include the crime of piracy in the court's statute. Today, in light of the changed climate in Somalia and the dangers posed by piracy, major super powers may have sufficient political incentive to come together and to redraft the ICC statute to include the crime of piracy. At the least, the ICC statute could adopt the UNCLOS restricted definition of piracy, as most countries already accept this definition as customary law and would likely not object to its formulation in the ICC. If pirates were prosecuted in the ICC, however, the court's judges would need to develop expertise in maritime law, and the court's caseload and dockets would increase significantly. This increase could cause problems for the ICC, as the court was established with limited resources and with the notion that it would only prosecute those responsible for the gravest violations of international law.²⁴⁹ While Somali pirates may be dangerous, they probably do not amount to the type of heinous defendant contemplated by the ICC drafters. The ICC model, although attractive, may contain significant limitations and may ultimately prove of little value.

Finally, pirates could be prosecuted in the International Tribunal for the Law of the Sea (ITLOS).²⁵⁰ This tribunal, established in 1996, is a specialized court equipped to deal with maritime disputes²⁵¹ and is composed of highly trained judges who are experts on the law of the sea.²⁵² ITLOS would represent the ideal venue for the prosecution of captured pirates.²⁵³ Because it is already a functioning tribunal, no additional costs would be incurred if pirates were prosecuted here, unlike in the ad hoc tribunal model, where significant monetary contributions would be needed by major maritime powers in order to

249. About the International Criminal Court, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> (last visited Apr. 4, 2010).

250. ITLOS Website, General Information, http://www.itlos.org/start2_en.html (follow "ITLOS Website" hyperlink; then follow "General Information – Overview" hyperlink; then follow "Introduction" hyperlink) (last visited May 15, 2010).

251. ITLOS Website, International Tribunal Law for the Sea, http://www.itlos.org/start2_en.html (follow "General Information – Overview" hyperlink; then follow "International Tribunal Law for the Law of the Sea" hyperlink) (last visited May 15, 2010).

252. *Id.*

253. *But see* Press Release, International Tribunal for the Law of the Sea [ITLOS], No. 135 (Apr. 24, 2009), *available at* http://www.itlos.org/start2_en.html (follow "News – Press Releases" hyperlink; then follow "2009" hyperlink) ("Recently certain news organizations have been circulating erroneous information stating that the International Tribunal for the Law of the Sea is prepared to try pirates. This information is inaccurate, since, in accordance with the United Nations Convention on the Law of the Sea, the Tribunal deals mainly with disputes between States Parties to the Convention; it is not a criminal court and has no competence to try Pirates.").

start the process. ITLOS judges are highly trained; thus, no training would be needed and no additional personnel costs incurred by any nation. While it is true that the ITLOS statute would need to be amended to provide for jurisdiction over the crime of piracy, this process could be less difficult than that needed to amend the ICC statute. ITLOS already includes a variety of maritime issues and offenses.²⁵⁴ The crime of piracy fits into the statutory scheme, and it does not represent a significant departure from the types of issues that this tribunal already handles.²⁵⁵ Finally, because ITLOS was designed to deal with all maritime issues between its member states, not simply the most heinous disputes and offenders, it could arguably accommodate a higher number of trials without losing any of its original establishing characteristics. Accordingly, ITLOS may be an appropriate choice of venue for the prosecution of Somali pirates.

All of the above types of tribunals are possible venues for the prosecution of Somali pirates. Piracy-fighting countries must ensure that for each detained pirate, one of the available tribunals is used for a piracy prosecution. Detained pirates should never be released or benefit from any de facto form of impunity, and pirate prosecution should fit within a structure of regional and global antipiracy efforts. In the same manner that countries have cooperated to form law enforcement and military antipiracy operations, such countries should collaborate to ensure that every pirate is brought before a jurisdiction that is prepared to mete out legal punishment.

B. Practical

For a true solution to the Somali piracy problem, greater cooperation between Somalia and its neighboring states and an improved commitment by major maritime states to increase their patrolling and law enforcement presence in the Gulf of Aden and farther out in the Indian Ocean is needed. "What is needed now is a network of shipping states, regional partners, and major maritime powers that can collaborate on how to respond to piracy attacks."²⁵⁶ Additionally, shipping companies themselves, who may be the biggest victims of pirate attacks, should join in the fight against piracy by

254. ITLOS Website, *supra* note 251. ITLOS has four different chambers adjudicating different types of disputes: the Chamber of Summary Procedure, the Chamber for Fisheries Disputes, the Chamber for Marine Environment Disputes, and the Chamber for Maritime Delimitation Disputes.

255. *Id.* (noting that ITLOS has mandatory jurisdiction in cases involving detention and release of crews and vessels).

256. Kraska & Wilson, *supra* note 9, at 42.

contributing financially and logistically to states' piracy-fighting efforts.

1. *Regional cooperation between Somalia and neighboring states*

As discussed above, piracy has been almost eradicated in Southeast Asia through regional efforts and cooperation by the most concerned countries: Singapore, Malaysia, and Indonesia.²⁵⁷ The three countries negotiated a series of surveillance and law enforcement measures in order to work together on the prevention and eventual elimination of pirate attacks.²⁵⁸ Such efforts include joint maritime patrols, regional information sharing on piracy attacks and intelligence data, and joint efforts in the apprehension of pirates.²⁵⁹ Other Asian countries have undertaken similar efforts, as evidenced by the ReCAAP Agreement.²⁶⁰ Moreover, similar types of cooperation already exist among countries fighting narco-traffickers.²⁶¹ The United States has concluded several cooperation agreements with Central and Latin American countries, wherein countries have agreed to combine efforts to fight narco-traffickers.²⁶² The United States has also initiated a partnership activity, the Proliferation Security Initiative, aimed at "counter[ing] the proliferation of weapons of mass destruction, particularly at sea."²⁶³ Under this partnership, "states commit to share information and disrupt the transfer or transport of weapons of mass destruction in accordance with a set of interdiction principles."²⁶⁴ Similarly, central and west African countries established a maritime organization in 1975, and later, a sub-regional coast guard network for cooperation on suppressing piracy, terrorism at sea, illegal fishing, drug trafficking, fuel theft and smuggling, pipeline security, and maritime accident response.²⁶⁵ These types of agreements represent a good model for the kind of cooperation needed in Somalia. Because Somalia does not have the capability to combat piracy alone, it should investigate the possibility of working with strong regional partners, such as Kenya

257. See *supra* Part III.B (discussing the various types of regional cooperation).

258. See *supra* Part III.B.

259. See *supra* Part III.B.

260. See Bradford, *supra* note 157, at 484 (discussing antipiracy efforts in Japan).

261. Kraska & Wilson, *supra* note 9, at 49.

262. See *id.* (noting the presence of nearly thirty narco-trafficking agreements, which oblige nations to "expedite communication on legal and jurisdictional issues associated with emergent counternarcotic operations at sea").

263. *Id.*

264. *Id.*

265. *Id.* at 51.

and Arabian Peninsula countries, in order to stifle the growth of piracy, similar to what other countries have done in the area of narco-trafficking and the non-proliferation of weapons of mass destruction.

First, Somalia could look for regional partners willing to employ their own maritime forces to patrol the Somali coast, thereby preventing pirates from freely operating from Somali ports out into the sea. If Somali coastal towns were routinely patrolled and inspected, pirate operations likely would be hindered if not eliminated altogether.²⁶⁶ Somalia could request assistance from the same regional partners in patrolling the Gulf of Aden and areas of the Indian Ocean relatively close to the Somali coast or particularly prone to pirate attacks. The increased presence of maritime patrols throughout the local seas could ward off at least some pirate attacks as well as provide additional security to ships sailing through those waters. Second, Somalia could work on information and data sharing with its regional partners in order to best predict the likelihood of pirate attacks in certain waters and to identify possibly suspicious ships spotted by its regional partners. Information sharing, like that of the Southeast Asian paradigm, could significantly increase the probability of pirate apprehension and thereby reduce the frequency of pirate attacks. Third, Somalia could conclude jurisdictional agreements with regional partners, allowing such partners to prosecute apprehended pirates, to the extent that Somalia is unable to do so. Through a regional network of countries willing to provide their criminal courts as prosecution venues for apprehended pirates, the likelihood of pirates being released after capture due to the unavailability of appropriate prosecution venues would be drastically reduced.

Moreover, regional agreements, such as that already in place between Kenya and the United Kingdom, would allow for pirate prosecutions regionally, providing an African solution to an African problem.²⁶⁷ This would also avoid situations such as the United

266. Of course, Somalia would have to agree to allow regional countries into its own territory for patrol and inspection purposes.

267. Diplomats have already called for an African solution to the African piracy crisis. See Jim Fisher-Thompson, *Diplomat Says Horn of Africa Crises Require African Solution*, AMERICA.GOV, Mar. 13, 2009, <http://www.america.gov/st/peacesecenglish/2009/March/200903131100501ejrehsiF0.5235>

559.html&distid=ucs (discussing former U.S. Ambassador to Ethiopia David Shinn's remark that "[t]he United States cannot and should not be expected to solve the problems of the Horn [of Africa] on its own"). Acting Assistant Secretary for Africa Phillip Carter has also stated that "the peace process [in Somalia] must be Somali-owned and -led." *Id.*

States' decision to prosecute a Somali pirate in New York, which has been criticized as an inappropriate venue for Somali pirate prosecutions.²⁶⁸ If Somalia had a regional partnership in place with some of its neighbors, then most pirates would ultimately face trial somewhere close to Somalia. Finally, Somalia could create agreements with regional partners for the detention of tried pirates, because Somalia may simply not have enough space in its own jails. If pirates served their sentences under appropriate conditions in the prisons of willing regional partners, then major maritime powers apprehending pirates might have fewer qualms about delivering pirates to places where they could face inhumane detention conditions. Thus, a regional scheme of law enforcement and cooperation between Somalia and its neighbors could produce significant results in the fight against piracy.

2. *Improved maritime patrols by major maritime powers*

Major maritime powers already patrol the Gulf of Aden, but these patrols could do more.²⁶⁹ Piracy has flourished in Somalia in part because of a lack of commitment by global maritime powers to engage in a true fight against pirates. Because piracy works at a supranational level, no particular country's national interests are threatened by any single pirate attack.²⁷⁰ A great majority of pirate attacks take place against ships flying flags-of-convenience from developing countries. In fact, ships routinely charter in countries like Liberia or Panama,²⁷¹ which provide them with the friendliest business and tax laws.²⁷² In some instances, ships

268. Tony Karon, *Why New York Is No Place to Try Somali Pirates*, TIME, Apr. 21, 2009, <http://www.time.com/time/world/article/0,8599,1892895,00.html>.

269. Kraska & Wilson, *supra* note 9, at 42 (noting that NATO and European Union countries have deployed warships to the Gulf of Aden to conduct patrols, and that the United Kingdom, Canadian, Turkish, German, Danish, Dutch, French, Pakistani, Indian, Iranian, and Russian navies have also deployed ships to the area, but that these patrols have had limited success).

270. *Id.* at 45 ("It is typical of the vessels attacked by Somali pirates that the ship may be registered in one nation, such as Greece, owned by a corporation located in another nation, such as South Korea, and operated by a crew comprised of nationals of several additional countries, such as the Philippines and Pakistan. Furthermore, the vessel is likely to be transporting either containerized cargo or bulk commodities owned by companies in another country, and the piracy attack may have been interrupted by a warship from yet another nation.").

271. *Id.* at 46.

272. Gabel, *supra* note 63, at 1439 (discussing the phenomenon of flags-of-convenience and concluding that "[t]his system also now allows shippers to hire cheap labor, to avoid the high cost of American crews and the burdens of stringent regulation, and to limit the financial consequences of any foundering or loss of a ship").

even charter in land-locked countries, like the Central African Republic, because such places provide them with excellent tax shelters and numerous business advantages.²⁷³ Those flag-of-convenience countries either completely lack interest in fighting Somali pirates, or they do not have adequate resources to do so.²⁷⁴ Major maritime powers that may have the resources to battle pirates may not have an incentive to do so if their own ships are not being attacked.²⁷⁵ Moreover, Somali pirates often kidnap the victim vessel's crewmembers, and the majority of crewmembers come from the developing world.²⁷⁶ As a result, maritime powers have little incentive to work toward crewmembers' release or toward the prevention of future hijackings because their own nationals are not held captive.

In recent months, however, pirates have gone after ships coming from the developed world: a U.S. ship was attacked in April 2009; a British luxury yacht was overtaken in the fall of 2009; and a Spanish ship was captured in the fall of 2009.²⁷⁷ These incidents have captured the attention of major maritime powers, urging them to focus more strongly on the Gulf of Aden and other waters off the Somali coast.

Maritime powers should increase their presence in the Indian Ocean and waters farther away from the Gulf of Aden and the Somali coast in order to intensify the frequency of patrols and the protection extended to ships sailing these treacherous waters. Some recent pirate attacks have occurred closer to the Seychelles and several hundred miles out into the Indian Ocean.²⁷⁸ Maritime powers should

273. J. Ashley Roach, Former U.S. Dept. of State, Comments at ASIL Meeting, (Mar. 26, 2009) (discussing pirate ransoms, and calling piracy "more profitable than fishing").

274. Halberstam, *supra* note 76 (discussing the reticence of flag-of-convenience states to do anything about piracy).

275. For example, legal and policy reasons have led some maritime powers, like Great Britain and Germany, to avoid capturing pirates or to release them after temporarily detaining them. Kraska & Wilson, *supra* note 22, at 56. The Netherlands has already released pirates without taking any legal action against them. *Id.*

276. Katherine Shepherd, Legal Adviser, Foreign and Commonwealth Office, Comments at ASIL Meeting, (Mar. 26, 2009) (discussing "ship riders," which are the people on the hijacked ship, and how the hijacked ship HMS *Cumberland* contained Yemeni fishermen who had been held hostage by the pirates).

277. See Azubuike, *supra* note 93, at 57 (discussing the Somali pirate attack on a U.S. ship, *Maersk Alabama*, in April 2009); see also Goodman, *supra* note 192 (discussing a Somali pirate attack on a Spanish ship); *Pirates Demand \$7 million for Yacht Couple, Britain Says*, CNN.COM, Oct. 31, 2009,

<http://www.cnn.com/2009/WORLD/africa/10/30/yacht.pirates/index.html?iref=al> search (discussing a hijacking of a British luxury yacht by Somali pirates).

278. Roach, *supra* note 273.

also increase the number of military and naval personnel present on board the patrolling ships, so that suspicious ships can be stopped and boarded, and any pirates can be detained if necessary. Finally, maritime powers should ensure that they have enough powerful weapons on board their patrolling ships, so that in case of actual battle with the pirates, maritime powers can defend themselves. Increased presence by major maritime powers throughout the waters of the Indian Ocean, as well as the Gulf of Aden, could contribute to the eradication of Somali piracy. In fact, the United States has already developed a comprehensive policy of diplomatic and legal action to fight piracy.²⁷⁹ The American piracy policy “emphasizes collaborative strategies by states and the maritime industry to prevent pirate attacks and other criminal acts of violence.”²⁸⁰ Some scholars believe that President Obama should “accelerate efforts to partner with shipping states, regional coastal states, and major port states to create a more effective international legal and enforcement network.”²⁸¹

Somali piracy has flourished because Somalia is a failed state, unable to deal with this issue on any serious level and because most regional powers in Africa and the Arabian Peninsula have underdeveloped law enforcement and criminal systems and few resources to help Somalia.²⁸² Consequently, operational and diplomatic partnering between Somalia, its regional partners, and the world’s most powerful maritime countries is crucial in order to create a network of states interested in repressing and eradicating Somali piracy.²⁸³ If this law enforcement, judicial, and diplomatic partnering does not take place, Somali pirates will continue to benefit from murky jurisdictional issues and “the inherent isolation of vessels and nations.”²⁸⁴ Maritime powers should focus their efforts on preventing this unfortunate outcome.

3. *Cost sharing structure between governments and shipping companies*

The efforts necessary to eliminate Somali piracy will entail great financial costs.²⁸⁵ Because governments of major maritime powers

279. Kraska & Wilson, *supra* note 9, at 44.

280. *Id.*

281. *Id.*

282. Kraska & Wilson, *supra* note 22, at 57–58.

283. *Id.*

284. *Id.* at 57.

285. For example, several technological advances have contributed toward the creation of weapons for combating piracy. Some of these advances include the installation of electric fences on ships, the antipiracy life jacket, and satellite tracking

may be reluctant to expend such vast sums of money on a relatively isolated problem²⁸⁶ and because shipping companies suffer the largest monetary losses in this situation, shipping companies should share the financial burden of fighting piracy with the major maritime countries and their governments.

Shipping companies could contribute specific amounts of money each year to naval coalitions of piracy fighting countries. Such resources could be used to purchase new navy ships, to equip navy ships with powerful weapons, and to train navy personnel in combat tactics. If shipping companies contributed significant amounts to maritime powers' governments, those governments could more easily justify the efforts in Somalia to their constituents by showing that the monetary expenditure is relatively low in piracy-fighting operations due to the shipping companies' donations. Shipping companies could, in exchange, ask for more serious protection of their ships sailing through the Gulf of Aden and the Indian Ocean. Instead of paying high ransoms to the Somali pirates, thereby exacerbating the piracy problem,²⁸⁷ shippers could give the same amount of money to world powers and to their naval patrols and law enforcement operations working against the Somali pirates. A cost-sharing structure could improve the likelihood of improved maritime presence in Somalia by the world superpowers and could thereby reduce the frequency of pirate attacks, saving shipping companies considerable ransom costs.

CONCLUSION

The next step in fighting piracy requires a smarter approach to counter-piracy operations, logistics, and the legal endgame. The major shipping nations and regional states must develop agreements to enable real-time coordination for dealing with detainees, sorting out where they will be temporarily held, and deciding on the venue for prosecution.²⁸⁸

Somali pirates are sea-terrorists and represent a global threat. Likewise, any response to such a menace should be global. Major

devices such as ShipLoc. However, the high expenses associated with these technological advances continue to impede the use of these antipiracy solutions. Dahlvang, *supra* note 54, at 42-44.

286. Carbin, *supra* note 19, at 55 (noting that "[t]he leading trading nations are evidently hesitant to take more direct measures" in the fight against Somali piracy).

287. *See id.* (noting that the international shipping community's willingness to pay ransoms to Somali pirates ensures that "the practice will continue").

288. Kraska & Wilson, *supra* note 9, at 48.

maritime powers should partner with countries in the regions where piracy proliferates to establish law enforcement and jurisdictional networks to ensure that pirates are apprehended as often as possible and that those who are captured are always prosecuted. Counter-piracy cooperation involving information and data sharing and joint maritime patrols off the Somali coast can increase the likelihood of pirate capture. Jurisdictional agreements among maritime powers and regional countries can increase the probability of prosecution, making at least one criminal forum available for all captured pirates. Finally, shipping companies themselves should contribute to the global fight against piracy by contributing financially and logistically to maritime countries already engaged in the process of eradicating piracy. Such a comprehensive antipiracy operation on a global scale is the only possible solution to the threat of Somali piracy.