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Foreword

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Recent developments relating to piracy, especially those involving Somali pirates, have shown the difficulty that States and the wider international community have in coping with this timeless challenge. While piracy is not a new phenomenon, its modern-day scale and complexity present a novel challenge. Indeed, history shows piracy to have been a practice carried out since man first ventured out to sea. It has persisted and thrived for centuries. Its origin is lost in the beginnings of time.

At least since the days of Ancient Greece and the Roman Empire, piracy has been a hurdle to maritime trade, affecting every maritime region of the world, from the Mediterranean and northern European seas, to those of Asia, the Middle East, Africa and, of course, the Americas.¹ After its peak in the seventeenth and eighteenth centuries, piracy diminished substantially, and at the end of the nineteenth century and for the greater part of the twentieth century, it seemed to have disappeared. It resurfaced noticeably in the 1970s and 1980s in various regions of the world, and most recently it has acquired dramatic proportions as Somali pirates have taken over ship after ship before the eyes of a world that seem unprepared to deal effectively with this daunting challenge. In the last few years, piracy has become a major source of concern for crews, shipowners, insurers, coastal communities, and international organizations.

If, in the past, the existing rules on piracy gave States enough guidance to deal with the problem, why is it that today States whose interests are most threatened have shown a degree of ineptitude in fighting against the current surge in piracy, particularly as it unfolds in Somali waters? Are there shortcomings or *lacunae* in the

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1. CORINNE TOURET, *LA PIRATERIE AU VINGTIEME SIECLE: PIRATERIE MARITIME ET AERIENNE* 4 (1992).

applicable international legal regimes that prevent States from effectively coping with modern-day piracy? Or is this weakness possibly attributable to a change in States' political attitude toward implementing effective measures against pirates?

The answers to these and other questions are the subject of some of the Articles in this Issue. These Articles go a long way in identifying the elements of an effective response to the challenges associated with piracy. They analyze relevant law, explore new ideas, and provide legal and policy suggestions for dealing with piracy. They discuss several possible legal means by which States can strengthen the effectiveness of actions taken to thwart piracy, from the law of salvage and private security contracts, to the payment of ransoms and more effective detention, transfer, and prosecution of pirates.

These Articles make a valuable contribution to the current discourse as it is presently being pursued by scholars and diplomats at meetings and conferences around the world. From reading these Articles it comes to mind, however, that perhaps the solution to the current surge in piracy may require a more thorough approach—one that explores the legal and judicial perspectives of an effective piracy regime, but also takes a broader look at other factors that may have to be taken into account.

The piracy regime under the United Nations Convention on the Law of the Sea (UNCLOS) is a jurisdictional regime that confers jurisdiction upon all States to act in the face of piratical acts.² UNCLOS recognizes the jurisdiction of any State over pirate ships or ships taken by pirates on the high seas³ as an exception to the principle of exclusive jurisdiction of the flag State. This exception to the principle of flag-State jurisdiction authorizes any State to search and seize the ship and cargo, arrest, prosecute, and punish offenders—whatever their citizenship—and to dispose of the ship and other property seized.

It thus seems clear that the fundamental nature of the international law governing piracy at sea is no more and no less than a special authority for any State to assert its jurisdiction⁴ over a

2. The origin of the piracy provisions contained in articles 100 to 107 of UNCLOS can basically be found in the rules contained in articles 14 to 21 of the Convention on the High Seas, which codified for the first time the traditional rules on piracy.

3. The reference to the high seas in UNCLOS includes the exclusive economic zone (EEZ) by operation of article 58.

4. Harvard Research in International Law, *Draft Convention on Piracy*, 26 AM. J. INT'L L. 739, 825-26 (Supp. 1932).

foreign-flagged vessel, its cargo, and the offenders. It does not impose on States any obligation to prosecute and punish the offenders or to dispose of seized property. This means that the international piracy regime only addresses the issue of jurisdiction over the pirate ship. The prosecution and eventual punishment of pirates, and the destiny of the ship and cargo involved, are left entirely to the domestic law of the arresting State.

For this and other reasons, some governments and scholars believe that although the piracy regime may have been effective in the past, it may not correspond effectively to the measures needed to combat modern-day piracy. Some scholars believe that the lack of effective measures to deal with Somali and other pirates may be attributed, in part, to the shortcomings of the piracy provisions as codified in UNCLOS.

First, UNCLOS excludes territorial seas, an important area of the ocean where perpetrators, knowing that the current piracy regime does not apply, have concentrated their activities so as to escape capture by foreign warships. In the past, the territorial sea was a narrow strip, generally three nautical miles wide. With the adoption of UNCLOS, the territorial sea was substantially enlarged to twelve nautical miles. This change has been a bonanza for pirates, for the enlargement of the territorial sea equally enlarged pirates' radius of criminal activity, keeping them outside the realm of States' common jurisdiction. Equipped with modern means of navigation, warfare, and communication, they can easily switch between the high seas and territorial waters, and thus escape arrest.

Second, UNCLOS does not impose a legal duty upon States to cooperate in the eradication of piracy in the entire ocean, but only on the high seas, as provided for in article 100. From a legal standpoint, the high seas continue to be the only area where piracy takes place. The legal duty to cooperate in the fight against piracy ceases to exist the moment pirates enter a State's territorial waters.⁵

Third, UNCLOS contains no mechanism for securing cooperation in the prosecution and punishment of pirates, especially for acts of armed robbery against ships in coastal waters, because coastal States might not be willing, or they may not have the means, to arrest, prosecute, and punish offenders.

5. Under international law, there is of course a general duty for States to cooperate, a principle which is also reflected in articles 117 and 197 of UNCLOS. This general duty to cooperate, however, differs from the duty to cooperate in matters of piracy as referred to in article 100 of UNCLOS.

Finally, UNCLOS does not impose on States an obligation to criminalize under their domestic legislation acts that constitute piracy under international law. Most countries, including some developed countries, do not have penal legislation that would apply to acts characterized as piracy or armed robbery against ships. As a result, some countries, after arresting pirates and having no crime with which to charge them, have been forced to release them.

The problem is compounded by the fact that some developed countries affected by piracy do not, for political or other reasons, want to follow the procedures codified in UNCLOS. Some of them have shown reluctance to try pirates in their domestic courts and have instead transferred pirates to third-party countries for prosecution. Since this transfer procedure seems to raise some legal hurdles under international law, these countries, as an alternative, have been exploring other means of bringing pirates to trial outside of their jurisdiction.

In an attempt to curb the current spiral of violence at sea, the news media, State officials, shipowners, and scholars have suggested possible solutions to what is perceived by some commentators as the ineffectiveness of current international law and the inability of the international community to deal effectively and efficiently with pirates and perpetrators of armed robbery against ships. Different views have been expressed in this regard recently, and some go so far as to promote the idea of creating an international judicial body to try pirates.

The international legal regime on piracy, as codified in articles 100 to 107 of UNCLOS, is, as already mentioned, a jurisdictional regime and, as such, only allows States to arrest pirates, seize their ships and cargo, and bring them to trial in the State's domestic judicial system. This legal regime is not predicated on the existence of an international criminal substantive law, nor does it contemplate any international judicial means or structure to try pirates.

As it stands now, there is no international court or tribunal that includes in its jurisdiction a mandate to try pirates. Once a State asserts its jurisdiction over pirates and their ship by arresting them, under the international piracy regime, that State is encouraged to try the pirates and dispose of the pirate ship and its cargo in accordance with its own national legislation and judicial system. This means that if the arresting State does not have penal legislation allowing for the punishment of pirates, or if the arresting State does not want to try them in its own territory for political or other convenience, then the legal regime as codified in UNCLOS is of little use.

Unfortunately, this seems to be the case with some countries that choose not to try Somali pirates under their own court systems. Facing this situation, what then can be done to stem the tide of piracy and bring the pirates to justice?

The answer to this question is still being debated by statesmen and politicians of the countries involved, as well as by commentators and academics. Whatever the outcome of this debate may be, it seems that the answer, to be effective and long lasting, cannot focus only on the improvement of the current legal regime that governs piracy, as some commentators suggest, nor can it focus only on a more effective implementation of that regime.

It would seem that the solution to the current surge in piracy requires a multi-faceted response. This may involve achieving State and regional stability in the affected coastal areas. The Somali pirates, after all, are able to hijack ships and kidnap crew members because they have a territory where the ships can be stored and where the crew members can be held for long periods while awaiting payment of ransom.

The situation in Somalia, which has added a new dimension to piracy, would not have existed had it not been for the political, social, and economic instability that has plagued that country for decades. Indeed, it is the advantage of having a territory where a hijacked ship can be brought ashore and where detained crew members can be held that has made the current surge in piracy different from its previous incarnations. Extorting huge ransoms from governments, insurers, or shipowners seems to be an easier and more profitable way to gain a living than simply stealing any cargo found onboard. The solution may also demand that the international community address the social and economic difficulties in the countries affected, particularly issues of poverty.

To fill the gaps in the current international piracy regime or to institute new ways to bring pirates to trial is of great relevance, but this alone may not permanently solve the piracy problem as it has unfolded today. The search for an effective response to piracy may still have a long way to go. I am sure that with the determination of States which have a major role to play in this regard, and with scholarly legal analyses and discussion, of which this Symposium is an example, the international community will find an appropriate solution to the problem. Let us hope that that solution is as effective as it is lasting.